Supreme Court, U.S.
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In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court resolve the conflict between its decisions in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997)? The former *requires* landowners seeking compensation for regulatory taking of property to sue in the state courts and *prohibits* them from suing in U.S. District Court. However, the latter simultaneously *grants* municipal defendants in such cases the *absolute right to remove* them to U.S. District Courts — even though (a) removal is authorized by 28 U.S.C. § 1441(a) only if the plaintiff could have filed suit in federal court in the first instance which, under *Williamson County*, landowners may not; and even though (b) the combination of *Williamson County* and *City of Chicago* gives municipal defendants a veto power over the plaintiff's 7th Amendment right to a jury trial under *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

   The Court of Appeals agreed with Petitioner that this situation represents an "anomalous . . . gap in Supreme Court jurisprudence," but declined to address it, explicitly concluding that how to resolve the conflict "is for the Supreme Court to say, not us."

2. When a city openly defies this Court's holding in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by (1) imposing onerous conditions on a land use approval that are grossly disproportional to the burdens the proposed project will create, and (2) flatly refusing its duty to show any proportionality, has the landowner stated a claim on which relief can be granted by a U.S. District Court?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Franklin P. Kottschade respectfully prays that a Writ of Certiorari issue to review a final judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision was filed on February 13, 2003, and is reported as *Kottschade v. City of Rochester*, 319 F.3d 1038 (8th Cir. 2003). (App., p. 1.) A timely Petition for Rehearing and Rehearing En Banc was denied in an unreported order filed March 21, 2003. (App., p. 8.) The District Court's opinion (App., p. 9) is unreported.

JURISDICTION

This case was filed because the City of Rochester defied this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). There, this Court held that a municipality could constitutionally condition the issuance of a land development permit only if its conditions were roughly proportional to burdens the proposed development would place on the community, and if the municipality satisfied demonstrated that proportionality. Here, Rochester imposed conditions that were grossly disproportionate, and repeatedly refused Mr. Kottschade's requests to explain how the conditions related to his development.

Mr. Kottschade sued in U.S. District Court for these 5th Amendment violations. That court dismissed, believing *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) required Mr. Kottschade to sue in state court first. Mr. Kottschade relied on *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). There, this Court held that a city sued in state court had the

right to remove the case to federal court under 28 U.S.C. § 1441(a) because the plaintiff could have filed suit in federal court in the first instance. Mr. Kottschade therefore urged that *City of Chicago* modified *Williamson County*, for if a defendant can remove, then *perforce* the plaintiff must be able to file in federal court initially.

The District Court concluded that, *City of Chicago* notwithstanding, *Williamson County* controlled and dismissed the case. (App., p. 16-.) The 8th Circuit affirmed. Although it agreed with Mr. Kottschade that the situation was "anomalous" (App., p. 5), that Court refused to address the anomaly, concluding that how to resolve it "is for the Supreme Court to say, not us" (App., p. 5).

This Court's jurisdiction is by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. § 1441(a):

"Except as otherwise expressly provided by Act of

Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

STATEMENT OF THE CASE

Frank Kottschade, a long-time resident of, and developer in, the City of Rochester, Minnesota, sued under 42 U.S.C. § 1983 charging a regulatory taking of property.

Mr. Kottschade sought to develop a townhouse project on a 16.4-acre parcel of land he acquired in 1992. After years of attempting to satisfy various city concerns (through four different development proposals), the city purported to grant a permit in June, 2000. However, it attached conditions to the permit that reduced the number of homes from 104 to 26, and added nearly $70,000 in development costs *to each unit* — in a market where such homes sell for $125,000. Economically, it was an impossibility. Constitutionally, it was a taking.

Knowing that this Court's decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994) allowed conditions only if they bore a rough proportionality to the burdens the proposed development would place on the community (and knowing that these conditions bore no relationship to his project whatever), Mr. Kottschade asked the city to explain the nexus and its proportionality. Even though *Dolan* placed the burden on the city to provide such an explanation, the city flatly refused. Twice. In writing.

Mr. Kottschade then filed this suit. The District Court dismissed (App., p. 17) and the 8th Circuit Court of Appeals, albeit with some expressly voiced discomfort (App., p. 5), affirmed (App. p. 7). Thus, this Petition.

REASONS FOR GRANTING THE WRIT

I. THE CONUNDRUM TO BE RESOLVED

A. Do State Or Federal Courts Have Initial (Or Sole) Jurisdiction Over Regulatory Taking Claims Under The 5th Amendment? And Who Decides?

In *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), this Court held that a municipal defendant in a state court action challenging the validity of land use regulations (under both state and federal law)[1] may remove that case to federal court. The rationale was that the plaintiff could have filed suit in federal court in the first instance (as the suit raised federal questions) and therefore 28 U.S.C. § 1441(a) granted the defendant the reciprocal right to remove the case. (522 U.S. at 164.) However, in *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court held that such plaintiffs may *not* file such actions in federal court, but must first repair to the state courts and seek compensation there, before their claims can be deemed ripe for federal court litigation. (473 U.S. at 200.)

In fairness to this Court, it appears that the briefs in *City of Chicago* did not call *Williamson County* to the Court's attention. The adversary system failed to disclose the doctrinal cliff toward which the Court was being urged.

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[1] The plaintiff in *City of Chicago* raised federal due process, equal protection and taking claims, as the trial court noted (1997 WL 171350) and this Court confirmed (522 U.S. at 160). It is the allegations in the complaint that determine federal jurisdiction. (E.g., *Bell v. Hood*, 327 U.S. 678, 681 [1946].)

That is likely why neither the majority nor the dissent in *City of Chicago* mentions *Williamson County*. As a consequence, the constitutional law of regulatory takings now contains two contradictory jurisdictional holdings.

B. Confusion And Unfairness Of "Catch-22" Proportions Abound In The Wake Of Two Conflicting Decisions From This Court.

The interaction between these two holdings has given rise to a true "Catch-22" conundrum. No matter which court property owners choose to file suit, their municipal adversaries can muster decisional law saying that they should be in the other court system.

Under *Williamson County*, landowners are said to be barred from federal court while *simultaneously* — under *City of Chicago* — defendants *in the same cases* can force them into federal court on the bizarre theory that the plaintiffs could have sued there in the first place, although — under *Williamson County* — they could not. Adding insult to injury, some federal courts have dismissed such removed cases on the stunning ground that the plaintiffs (who were brought to federal court involuntarily by the defendants) should have pursued their action in state court.[2]

The upshot is that either *City of Chicago* modified

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[2] E.g., *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623, 626 (5th Cir. 2003); *Reahard v. Lee County*, 30 F.3d 1412, 1414, 1418 (11th Cir. 1994) (after two federal trials and two appeals). See *Anderson v. Charter Township. of Ypsilanti*, 266 F.3d 487 (6th Cir. 2001) (landowner sued in state court, municipality removed to federal court, district court abstained and remanded state claims to state court; when property owner returned to district court to litigate federal claims, district court dismissed the case under the *Rooker-Feldman* doctrine).

Williamson County or the Court has inadvertently created not only an insoluble anomaly in the law, but also a class of American litigants who are *de facto* pariahs — second class citizens whose sole access to federal court rests on the whim of the defendant, and who are at times subjected to a judicial "ping-pong game" whereby they file suit in state court, only to have it removed to federal court, which then remands it back to state court. (E.g., *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173 [D. Kans. 1999]; *Vigilante v. Village of Wilmette*, 88 F. Supp. 2d 888 [N.D. Ill. 2000].)

Mr. Kottschade submits that this Court could not have intended to bring about such a grotesque procedural regime, and urges that the prevailing "ripeness mess"[3] cries out for a second look by this Court to reconcile *Williamson County* with *City of Chicago*, and inform aggrieved property owners whether they can *ever* have their federal constitutional cases heard on the merits in federal court.

C. The Unfairness And Confusion Created By This Jurisdictional Conflict Are Widely Recognized.

Courts and commentators expressed confusion and unhappiness with the jurisdictional problems created when *Williamson County* held that property owners could try their regulatory taking cases in federal court, but only after first "ripening" them in state court. (See *post*, pp. 23-26.)

City of Chicago exacerbated the situation. Lawyers from the ABA's State and Local Government Law Section, representing diverse clients, concluded after a weekend

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[3] See John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse,* 31 Urb. Law. 195, 196, fn. 5 (1999).

retreat devoted to this and related issues that either both parties or neither ought to have access to the federal courts:

> "The second and third recommendations deal with the apparent anomaly in effect, though probably not in intent, when *Williamson* is juxtaposed against *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). Under *City of Chicago*, governmental defendants can, and frequently do, remove takings claims initiated in state court to federal court under the federal removal statute. At the same time, under *Williamson*, plaintiffs who bring those very same claims in federal court are told they must litigate in state court. As a result, the defendants in takings claims have a choice of forum — state or federal — while takings plaintiffs under *Williamson* are apparently required to go only to state court." (*Report of Retreat on Takings Jurisprudence*, in *Taking Sides on Takings Issues* 568, 574 [ABA 2002; Thomas E. Roberts, ed.].)

The ABA retreat thereby ended by asking for judicial help in resolving the dissonance between *Williamson* and *City of Chicago*. Mr. Kottschade asks this Court to take this opportunity to correct the anomalous state of regulatory takings jurisdictional jurisprudence.

II. THERE IS DIRECT CONFLICT BETWEEN TWO DECISIONS OF THIS COURT: *WILLIAMSON COUNTY* PRECLUDES PROPERTY OWNERS FROM SUING IN FEDERAL COURT FOR 5TH AMENDMENT REDRESS, WHILE *CITY OF CHICAGO* WELCOMES MUNICIPAL DEFENDANTS TO REMOVE THE SAME CASES TO FEDERAL COURT. THEY CANNOT OPERATE HARMONIOUSLY.

Simply put, *Williamson County* and *City of Chicago*

are — as applied below — in direct conflict. *City of Chicago* is based on the even-handed rule of 28 U.S.C. § 1441(a), i.e., if the plaintiff could have filed suit in federal court but chose the state venue instead, then the defendant has the absolute right to remove the case to federal court. Thus, if *City of Chicago* is to be viewed as rational, Mr. Kottschade should have been permitted to file suit directly in federal court. The courts below, however, refused to apply *City of Chicago* because, in their view, until this Court itself reconciles it with *Williamson County*, then *Williamson County* mandates dismissal regardless of what *City of Chicago* may have said later. Under the lower courts' reading of this Court's decisions, only one of the parties to litigation like this has free access to federal court, while the other has none. [4] As summarized in a leading treatise:

> "While not put so starkly, the message for property owners seems to be: 'You can't be heard in federal court, but your opponents can.' " (Steven J. Eagle, Regulatory Takings 1091 [2d ed. 2001].)

That cannot be the law.

28 U.S.C. § 1441(a) restricts removal to:

> ". . . any civil action brought in a State court *of which the district courts of the United States have original jurisdiction*." (Emphasis added.)

Thus, unless the International College of Surgeons

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[4] That the *City of Chicago* complaint also contained due process and equal protection claims is of no moment. As Professor Kovacs has explained, the same Williamson County ripeness rule has been applied to those claims. (Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under Williamson County*, 26 Ecology L.Q. 1, 19 [1999] [collecting exemplars of each].)

could have brought its regulatory taking case in U.S. District Court initially, based on that court's original jurisdiction, the City of Chicago *could not* have been permitted to remove the case to federal court. But had the International College of Surgeons filed initially in federal court, it would have received the same response as Mr. Kottschade: case dismissed. That has been the consistent lower court treatment since *Williamson County*. (See Delaney & Desiderio, *supra*, 31 Urb. Law. at 206-231 [collecting and analyzing in tabular form all federal land use cases decided between 1990 and 1998].)

In ruling that removal was proper, this Court concluded simply that, "a case containing claims that local administrative action violates federal law . . . is within the jurisdiction of federal district courts." (*City of Chicago*, 522 U.S. at 528-529.) The Court was well aware of the momentous nature of its decision. Any doubt was dispelled by Justice Ginsburg's dissent, characterizing the decision as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180), because:

> "After today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (522 U.S. at 175; Ginsburg, J., dissenting.)

Here, the Courts below concluded that, until this Court expressly says otherwise, they would have to apply *Williamson County* and dismiss this case because it had not gone through state court on the way to federal court. (App., pp. 5, 16.) As the Court of Appeals put it, the result of this "perceived gap in Supreme Court jurisprudence" is "anomalous" (App., p. 5), but whether *City of Chicago* authorizes any relief from this anomaly "is for the Supreme Court to say, not us" (App., p. 5).

It cannot be the rule that property owning plaintiffs are barred from federal court while municipal defendants in the same cases have a free pass into federal court whenever they like. The issue goes to jurisdiction. Property owners are said to be unable to file in federal court because the federal courts lack jurisdiction. (E.g., *Reahard*, 30 F.3d at 1415.) But jurisdiction cannot magically appear out of thin air merely because some municipal defendant wants it. Jurisdiction exists, or it does not. Yet *City of Chicago* and *Williamson County* now simultaneously answer the same jurisdictional question "yes" and "no." The decisions below make plain that lower courts will not address this "mess" without guidance. Clarification by this Court is necessary.

III. EVEN BEFORE THIS COURT ISSUED ITS SECOND — CONFLICTING — OPINION, LOWER COURTS HAD MADE A HASH OF A RULE THIS COURT DESIGNED AS "*NOT YET RIPE* FOR FEDERAL COURT," TURNING IT INTO A RULE OF "*NOT EVER* IN FEDERAL COURT."

A. The Premise Of *Williamson County* Was That Property Owners Would Be Able To Obtain A Federal Court Ruling On The Merits Of Their Regulatory Taking Claims After They First "Ripened" Their Cases In State Court.

Even commentators opposed to landowners concede (as they must) that the plain language of *Williamson County* contains a clear promise of federal court access:

> "Reliance [by the Court] on the ripeness rationale, unfortunately, suggests to property owners that their complaints will be ripe and heard in the federal courts after their state suits are over." (Thomas Roberts, *Fifth*

Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata, 24 Urb. Law. 479, 480 [1992].)

Williamson County made clear that this Court was (a) deciding whether a claim was YET ripe for litigation in federal court and (b) that there were things which FIRST had to be done in state court AFTER WHICH the federal constitutional claims WOULD BE RIPE for federal court.

The Court's analytical discussion begins by saying that ". . . respondent's claim is *premature*." (473 U.S. at 185; emphasis added.)[5] Prematurity necessarily means that something is yet to be done to make the matter mature, or jurisprudentially "ripe." *Williamson County* then says that, because of the lack of both a final administrative decision (not in issue here[6]) and the absence of an attempt to seek compensation in state court, ". . . respondent's claim is *not*

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[5] The Court did *not* say there was no valid claim. Nor could it. Federal courts at that time had dealt with such claims — as they routinely deal with other Bill of Rights claims — for years. See, e.g., *Nemmers v. City of Dubuque*, 764 F.2d 502 (8th Cir. 1985); *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 99th Cir. 1983); *Barbian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Fountain v. Metro Atlanta Rapid Transit Auth.*, 678 F.2d 1038 (11th Cir. 1982); *Hernandez v. Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978).

[6] Here, the city granted Mr. Kottschade a permit, albeit subject to financially ruinous conditions, and refused any variances. Thus, in *Williamson County's* words, we know precisely "how [he] will be allowed to develop [his] property." (473 U.S. at 190.) As the court below pointed out, Mr. Kottschade — in contrast to *Williamson County* — had exhausted his administrative remedies (App., p. 5) and thus had obtained a final determination of what the city would approve.

ripe." (473 U.S. at 186; emphasis added.) Absence of ripeness necessarily means that the matter can be ripened.

Throughout the opinion, the Court returns to these twin concepts, emphasizing and reemphasizing the temporal nature of its holding, repeatedly saying that such cases *can* be ripened and *then* litigated in federal court. The Court's language demonstrates that the Court plainly was *delaying* a property owner's entry into the federal courthouse, not barring it. That concept of a dilatory plea is crucial in analyzing the development of the law since then.

> "A second reason the taking claim is *not yet ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so." (473 U.S. at 194; emphasis added.)
>
> "Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause *until* it has used the procedure and been denied just compensation." (473 U.S. at 195; emphasis added.)
>
> ". . . *until* [plaintiff] has utilized that procedure, its taking claim is *premature*." (473 U.S. at 197; emphasis added.)

The opinion ends as it began, with this conclusion:

> "In sum, respondent's claim is *premature*, whether it is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." (473 U.S. at 200; emphasis added.)

Thus, *Williamson County* is founded on the twin concepts of "not yet" and "not until." But lower courts have lost track of that. Instead, property owners who satisfy *Williamson County* find, when attempting to file their now-ripened federal suits, that the door is barred by *res judicata*

and collateral estoppel. (See *post*, p. 17.)[7] Thus, the upshot is that this Court's endorsement of property owners' right to litigate in federal court after ripening their suits in state court has been overruled by lower courts. Instead, takings plaintiffs have been banished to state courts.

If that had been this Court's intent, *Williamson County* could have said so. Directly. Its holding could have been simple and straightforward: "All takings litigation must be brought in state courts; federal courts have no jurisdiction to entertain it, even though it involves the application of the federal Constitution." Period. Plainly, neither the Congress that enacted 42 U.S.C. § 1983 nor the Court that wrote *Williamson County* had that in mind. Quite the contrary. All commentators agree that the Court's words plainly tell property owners that the way to litigate their 5th Amendment cases in federal court is to "ripen" them by litigating first in state court.[8]

Williamson County's evident establishment of a system by which property owners could eventually litigate federal issues in federal court was in keeping with a long line of decisions holding that those who plead federal

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[7] As the 8th Circuit put it below, Mr. Kottschade was "justly" concerned about this likelihood. (App., p. 6; 319 F.3d at 1041.)

[8] E.g., Steven J. Eagle, *Regulatory Takings* 1063 (2d ed. 2001) ("The 'ripeness' metaphor is one that promises ultimate vindication"); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation,* 11 J. Land Use & Envtl. L. 37, 67 (1995) ("the language . . . suggests that the state law suit is merely preparatory to a federal suit"); Madeline J. Meacham, *The Williamson Trap,* 32 Urb. Law. 239 (2000) ("language . . . suggested that, eventually, a litigant's taking claim would be heard in federal court"); *Id.* at 249 ("language of Williamson suggests that a federal claim will survive after disposition in the state court").

claims and seek the aid of federal courts have a right to a federal determination. (E.g., *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 [1909]; *Bell v. Hood*, 327 U.S. 678, 681 [1946]; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 [1964].) As this Court put it, there are "fundamental objections" to compelling a plaintiff who has legitimately invoked federal jurisdiction "without his consent and with no fault of his own, to accept instead a state court's determination of those claims." (*England*, 375 U.S. at 415.) It is no different here.

B. Lower Courts Have Misused *Williamson County* As A Device To Prevent Property Owners —Alone Among Citizens — From Litigating *Federal* Constitutional Issues In *Federal* Court.

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation . . . ." (*Dolan v. City of Tigard*, 512 U.S. 374, 392 [1994].

Notwithstanding this Court's clear language, property owners have been *de facto* singled out for virtual exclusion from the federal court system for redress of their 5th Amendment grievances against local government agencies. As things stand now American land owners like Mr. Kottschade — unlike any other citizens — may *never* obtain federal adjudication of their federal rights.

1. Property owners are the only victims of Bill of Rights violations who are barred from seeking redress in federal court.

That property owners have been singled out is clear. (See, e.g., Eagle, *supra* at 1068-1070; Timothy J. Kassouni,

The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights, 29 Cal. West. L. Rev. 1, 2 [1992]; Robert H. Freilich, Adrienne H. Wyker & Leslie Eriksen Harris, *Federalism at the Millennium: A Review of U.S. Supreme Court Cases Affecting State and Local Government*, 31 Urb. Law. 683, 685 [1999].) As one commentator concluded, "[t]he state compensation portion of [*Williamson*] finds no parallel in the ripeness cases from other areas of the law." (Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 Vand. L. Rev. 1, 23 [1995].)

Paradoxically, federal court protection is routinely provided in *some* land use cases — but only those involving aspects of the Bill of Rights *other than* the Fifth Amendment. Federal court First Amendment cases abound, for example, in which the validity of local land use ordinances regulating, or zoning for, sexually explicit work has been challenged.[9] There is no requirement of first presenting the issues to state courts, even though they implicate the same zoning policies and land use ordinances as do other land use cases. First Amendment cases dealing with the land use aspects of establishment of religion are also litigated in federal courts in the first instance[10]

Moreover, at the behest of aggrieved citizens, federal courts have involved themselves in the local intricacies of city budget policy,[11] county law enforcement

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[9] E.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

[10] E.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Larkin v. Grendel's Den*, 459 U.S. 116 (1982); *First Assembly of God v. Collier County*, 20 F.3d 419 (11th Cir. 1994).

[11] *Berkley v. Common Council*, 63 F.3d 295 (4th Cir. 1995) (*en banc*).

policy,[12] municipal policy governing the use of force during arrests,[13] county road acquisition policy,[14] municipal employment policy,[15] city medical care policy,[16] school district sexual abuse policy,[17] police department sexual harassment policy,[18] and even the question whether "extortion of outsiders, businessmen, or developers" was town policy.[19] As this Court once noted, federal courts routinely review issues involving exercise of a state's sovereign prerogative, including the power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue bonds without a referendum, and a host of others. (*County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-192 [1959] [collecting cases] [retaining federal court jurisdiction over a state eminent domain case].)

The cited cases deal with parallel features of the Bill of Rights, routinely protected in federal court through 42 U.S.C. § 1983 — even against unconstitutional land use regulations. All sorts of local governmental issues are litigated in federal courts every day. And they involve all

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12 *Turner v. Upton County*, 915 F.2d 133 (5th Cir. 1990).

13 *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996), *cert. denied* 117 S.Ct. 1086 (1997).

14 *Hammond v. County of Madera*, 859 F.2d 797 (9th Cir. 1988).

15 *Richardson v. Leeds Police Dept.*, 71 F.3d 801 (11th Cir. 1995).

16 *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991).

17 *Gonzalez v. Ysleta Indep. School Dist.*, 996 F.2d 745 (5th Cir. 1993).

18 *Gares v. Willingboro Township.*, 90 F.3d 720 (3d Cir. 1996).

19 *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir. 1996).

aspects of the Bill of Rights — except the 5th Amendment's Just Compensation Clause.

2. Doctrines of claim and issue preclusion have been misemployed by lower courts to undercut *Williamson County*'s "ripening" process.

The mechanism for keeping property owners out of federal court has been the combination of *Williamson County*'s requirement of state court litigation with *res judicata* and collateral estoppel. The law is used as a diabolical trap. Once a property owner sues in state court, any attempt to follow *Williamson County*'s directive to *then* litigate the "ripened" 5th Amendment case in federal court is met by one or more of the preclusion doctrines and the case is summarily dismissed.

Federal cases dismissing property owners' "ripened" efforts at federal court litigation abound. (E.g., *Dodd v. Hood River County*, 136 F.3d 1219 [9th Cir. 1998]; *Peduto v. City of North Wildwood*, 878 F.2d 725, 726-729 [3d Cir. 1989]; *Palomar Mobilehome Park Assn. v. City of San Marcos*, 989 F.2d 362, 364-365 [9th Cir. 1993]; *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 [10th Cir. 1998]; *Rainey Brothers Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment*, 967 F. Supp. 998, 1002 (W.D. Tenn. 1997], *aff'd* 178 F.3d 1295 [6th Cir. 1999][table][unpublished Sixth Circuit opinion at 1999 U.S. App. LEXIS 6396].)

Thus, according to these cases, "the very act of 'ripening' a case also ends it." (Robert H. Freilich, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 Urb. Law. 371, 387 [1999].) In Prof. Roberts' colorful words:

> "Ironically, an unripe suit is barred at the moment it comes into existence. L ike a tomato that s uffers vine

rot, it goes from being green to mushy red overnight. It is never able to be eaten." (Thomas E. Roberts, *supra*, 11 J. Land Use & Envtl. L. at 72.)

As seems evident from the language of *Williamson County* and its underlying theory of "ripening" matters for federal court litigation, this Court intended no such thing. Rather, it granted property owners an opportunity to litigate their 5th Amendment cases in federal court. It is therefore apparent that the lower courts are undermining this Court's intent.[20] Plainly, the preclusion doctrines being used to bar federal court litigation were known to this Court when it decided *Williamson County*. Just as plainly, *Williamson County* established a system that permitted dual court litigation: first in state court, to exhaust the state compensation remedy and thereby "ripen" the case, followed by an action in federal court, to litigate the merits of the underlying 5th Amendment claims. If the lower courts are correct, then the *Williamson County* "ripening" procedure was stillborn, and this Court wasted its time in formulating it. As the 10th Circuit put it, "It is difficult to reconcile the ripeness requirements of *Williamson* with the laws of res judicata and collateral estoppel." (*Wilkinson*, 146 F.3d at 1325, fn. 4.) It is time for this Court to review the way in which its *Williamson County* decision has been treated by the lower courts. Either the requirement of state court litigation should be eliminated, or it should have no preclusive impact on subsequent federal court litigation.

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[20] This Court made it crystal clear in *England*, 375 U.S. at 416-417 that limiting a litigant to certiorari review from a State supreme court was not an acceptable substitute for full federal court litigation. (Compare App., p. 7, where the court below disagreed.) Besides, state courts often dispose of these cases on the basis of state law, so that seeking certiorari may not even be possible.

C. With Respect, There Is A Flaw At The Core Of *Williamson County* That Explains The Lower Court Confusion: Its Assumption That A 5th Amendment Taking Without Just Compensation Is Not Complete Until A State Court Certifies That The Local Agency Really Won't Pay.

The 5th Amendment's Just Compensation Clause (the first element of the Bill of Rights to be incorporated into the 14th Amendment's Due Process Clause)[21] prohibits government from taking private property for public use unless it pays just compensation. Logically, a violation of that provision occurs as soon as government actions take private property and the municipality refuses to pay. There is nothing in either logic or the 5th Amendment to require that refusal to be certified by a state court before it is complete.

Therein lies *Williamson County*'s flaw. The opinion quite properly begins its analysis with the words of the 5th Amendment, noting that the constitutional provision "does not proscribe the taking of property; it proscribes taking without just compensation." (473 U.S. at 194.) The problem arises because the Court then blends or blurs the distinction between acts of the agency that has actually committed the taking and the State that may or may not have provided a litigational process for seeking compensation. (473 U.S. at 195-196.)

But the *State* is not involved in 42 U.S.C. § 1983 cases like this one. States and their officials cannot be sued under section 1983 (*Will v. Michigan Dept. of Police*, 491 U.S. 58 [1989]), nor (with very narrow exceptions [*Nevada Dept. of Human Resources v. Hibbs*, 123 S.Ct. 1972

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21 *Chicago B.&Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

[2003]) can they be brought into federal court at all against their will (U.S. Const., 11th Amendment). The real issue is whether the local entity — like the City of Rochester at bench — is alleged to have taken private property for public use and failed to pay for it. If so, the question whether the city can be *compelled* to pay lies at the heart of both state and federal court litigation. Thus, the aggrieved property owners' adversaries ask: how can the plaintiff get a "second bite of the apple" by simply re-filing for the same relief on the same facts in the other court system?

The answer lies in the fact that, under *Williamson County*, the aggrieved property owners have no choice whatever — they *must* sue first in state court, even though they desire only one "bite" — and they want that one in the federal courts, the historical guardians of the federal Constitution — the same as other plaintiffs complaining of federal law violations.

The crux of the problem is *blurring the State legal system with the local agency defendant* and disregarding the plain words of the Constitution. Nothing in the 5th Amendment requires that. It does not say ". . . nor shall private property be taken for public use without just compensation *as finally determined by suing the municipal defendant in state court.*"

The issue is not whether a state has countenanced the constitutional violation; the suit is not against the state. Rather, the issue is whether the particular defendant has committed it. 42 U.S.C. § 1983 forbids any person acting under color of state law from violating rights secured by federal law. When a city council — like Rochester's — prohibits viable economic use of property without any pretext of compensation, it has violated Section 1983. The presence or absence of a state remedy has no bearing on whether the malefactor has done the deed.

Nor are other constitutional rights treated that

way.[22] Just as the Constitution forbids taking property, but only without just compensation, so the Constitution forbids the deprivation of life and liberty — but only if done without due process of law. The constitutional provision is the same 14th Amendment stricture: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." And yet, plaintiffs complaining about deprivations of life or liberty without due process of law are not told they must first sue in state courts to determine whether relief can be had there, as a precondition to seeking redress in federal court. Quite the contrary. Their suits take place in federal court; the validity of the defendant's actions under state law, and the availability of state remedies is irrelevant. (See *Monroe v. Pape*, 365 U.S. 167 [1961] [police brutality case not required to be preceded by state tort suit for assault and battery]; *Felder v. Casey*, 487 U.S. 131, 148 [1988] [section 1983 suits are enforceable in federal court "*in the first instance*"] [emphasis added]; cf. *Screws v. United States*, 325 U.S. 91, 108 [1945].)

If, as *Williamson County* said, the federal violation is not ripe until a *state court* verifies that state law provides no remedy, then all Section 1983 litigation would have to begin in state courts. In the words of the leading treatise, "If there is a reason why free speech cases are heard by

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22 *Williamson County*'s analogy to the Tucker Act's provisions for suing the United States for a taking (473 U.S. at 194), while superficially plausible, seems inapt. All that the Tucker Act cases say is that, before a property owner can sue to *invalidate* a federal law as a taking, the owner must first sue in a *federal* court for compensation under the *federal* Constitution. That is all Mr. Kottschade and others want: the ability to sue the offending municipality immediately in a *federal* court for compensation for violating the *federal* Constitution.

federal judges with alacrity and property rights cases receive the treatment indicated above [i.e., diversion to state courts], it is not readily discernible from the Constitution." (Eagle, *supra* at 1070.)[23]

There is no need to sue in state court merely to confirm the non-payment. The non-payment is obvious; it is the reason for the suit. This can be seen in any regulatory taking case. In *City of Monterey*, 526 U.S. 687, for example, the taking occurred in 1986, the case was furiously litigated, through two appeals to the 9th Circuit and one trip to this Court. That process did not end for another 13 years. At no time — even after a compensatory judgment had been entered after trial — did the city offer to pay anything. Suit was not necessary to determine the lack of compensation.

Nor is a state court suit needed to inform the defendant of the problem. Given the complexity of today's land use procedures — usually requiring years of effort and endless hearings before action is taken — any agency that is not comatose is well aware by the end of the process that the property owner claims the city action violates the 5th Amendment. Here, for example, Mr. Kottschade directly told the city that its actions had taken his property and demanded that the city begin proceedings to condemn the land and compensate him. The city denied it. Must he now impose on the time of a state court seeking to have it say the obvious? To what end?

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23 See also Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on Williamson County Regional Planning Board v. Hamilton Bank*, in *Taking Sides on Takings Issues: Public and Private Perspectives*, (A.B.A. 2002; Thomas E. Roberts ed.) (contrasting the treatment of land use cases with police brutality and parade permit cases).

There is no need to require the victim to approach a third party (the state courts) in order to establish that she has a federal claim at all. That is a job for the federal courts. Worse, deferring to state courts is tantamount to granting state courts a veto over citizens' access to federal court, making them *de facto* federal court gatekeepers. On the contrary, this Court has repeatedly concluded that "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." (*Felder v. Casey*, 487 U.S. 131, 144 [1988], quoting *Wilson v. Garcia*, 471 U.S. 261, 269 [1985].)

D. Commentators Have Vied With Each Other Devising Ways To Disparage The Quagmire The Lower Courts Have Created In Their Applications Of *Williamson County*.

Even before *City of Chicago*, lower court applications of *Williamson County* were described by courts and commentators as "odd,"[24] "unpleasant,"[25] "unfortunate,"[26] "ironic,"[27] "unclear and inexact,"[28]

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24 *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1307, fn. 8 (11th Cir. 1992).

25 Roberts, *supra*, 24 Urb. Law. at 480.

26 *Fields v. Sarasota-Manatee Airport Auth.*, 953 F.2d 1299, 1306, fn. 5 (11th Cir. 1992); Jan Laitos, *Law of Property Rights Protection* § 10.05[A][5], p. 10-25 (Aspen Publishers 1999).

27 Kathryn E. Kovacs, *supra*, 26 Ecology L.Q. at 20.

28 Robert Meltz, Dwight H. Merriam & Richard M. Frank, *The Takings Issue* 67 (Island Press 1999).

"surprising,"[29] "worse than mere chaos,"[30] "dramatic,"[31] "misleading,"[32] an "anomaly,"[33] "paradoxical,"[34] "most confusing,"[35] a "source of intense confusion,"[36] "inherently nonsensical,"[37] "shocking,"[38] "absurd,"[39] "self-stultifying,"[40] "revolutionary,"[41] "nonsense,"[42] "draconian,"[43] "riddled with obfuscation and inconsistency,"[44] and thereby creating "a procedural

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29 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 67.

30 Freilich, *supra*, 31 Urb. Law. at 387.

31 Gregory Overstreet, *Update on the Continuing and Dramatic Effect of the Ripeness Doctrine on Federal Land Use Litigation,* 20 Zoning & Plan. L. Rep. 17 (1997).

32 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

33 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 479; Roberts, *supra*, 11 J. Land Use & Envtl. L. at 68.

34 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71; Stein, *supra*, 48 Vand. L. Rev. at 93.

35 Laitos, *supra*, p. 10-20.

36 Freilich, *supra*, 31 Urb. Law. at 387.

37 Freilich, *supra*, 31 Urb. Law. at 387.

38 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

39 Overstreet, *supra*, 20 Zoning & Plan. L. Rep. at 27.

40 Freilich, *supra*, 31 Urb. Law. at 387.

41 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra*, 26 Ecology L.Q. at 20.

42 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 480.

43 *Dodd v. Hood River County*, 59 F.3d 852, 861 (9th Cir. 1995); see Kovacs, *supra*, 26 Ecology L.Q. at 20.

44 Testimony of Prof. Daniel R. Mandelker before the House Judiciary Committee, reproduced at 31 Urb. Law. 234, 236 (1999).

morass,"[45] "conflict of decision,"[46] a "result [that] makes no sense,"[47] "doctrinal confusion,"[48] a "mess,"[49] a "trap,"[50] a "quagmire,"[51] a "Kafkaesque maze,"[52] and "a fraud or hoax on landowners."[53]

It is worth noting that many of these commentators are avowedly government-oriented in their views, yet they agree with landowners' criticisms and they clearly are troubled by the chaotic and unjust nature of the rule in question.

Enough time has passed and enough experience has been had in lower courts for this Court to examine the operation of the *Williamson County* rule and re-evaluate its conclusion that *de facto* denies land owners any opportunity whatever to try their *federal* constitutional claims in *federal*

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45 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 482.

46 Freilich, *supra*, 31 Urb. Law. at 388; Meacham, *supra*, 32 Urb. Law. at 240 ("The circuits have been divided on whether there is a way to avoid the Williamson trap, and the Supreme Court has sent conflicting messages.")

47 Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 478.

48 Freilich, *supra*, 31 Urb. Law. at 388.

49 Delaney & Desiderio, *supra*, 31 Urb. Law. 195.

50 David A. Dana & Thomas W. Merrill, *Property Takings* 264 (2002); Freilich, Wyker & Harris, *supra*, 31 Urb. Law. at 716; Daniel R. Mandelker, Jules B. Gerard & E. Thomas Sullivan, *Federal Land Use Law* § 4A.02[6] at p. 4A-21 (Clark, Boardman, Callaghan 1998); Meacham, *supra*, 32 Urb. Law. 239; Meltz, Merriam, & Frank, *supra* at 67.

51 Kassouni, *supra*, 29 Cal. West. L. Rev. at 44.

52 Kassouni, *supra*, 29 Cal. West. L. Rev. at 51.

53 Roberts, *supra*, 11 J. Land Use & Envtl. L. at 71.

courts. As Professor Mandelker put it:

> "In my opinion, federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits." (Mandelker, *supra*, 31 Urb. Law. at 236.)

Only this Court can end that distortion and bring some rationality to the jurisdictional aspects of regulatory takings law.

IV. AS A DIRECT RESULT OF LOWER COURT MISUSE OF *WILLIAMSON COUNTY*, AND NOW THEIR DISREGARD OF *CITY OF CHICAGO*, PROPERTY OWNERS IN 5TH AMENDMENT TAKING CASES HAVE NOT ONLY BEEN DENIED ACCESS TO FEDERAL COURTS TO PURSUE FEDERAL REMEDIES UNDER 42 U.S.C. § 1983, BUT ALSO DENIED THE 7TH AMENDMENT RIGHT TO A JURY GUARANTEED BY THIS COURT'S *CITY OF MONTEREY* DECISION.

Lower court actions barring property owners from federal court (except, when defendants invoke *City of Chicago* and remove state court litigation) have serious consequences: they deny aggrieved parties the ability to invoke civil rights jurisdiction under 42 U.S.C. § 1983 to have federal courts guard against local government incursions into constitutionally protected realms, and they deny property owners the 7th Amendment right to a jury trial that is provided in federal court, but generally denied in state courts in land use cases, in deciding governmental liability under section 1983. (*City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719 [1999].)

A. The *Williamson County* Rule, As Applied By The Lower Courts, Denies Property Owners The Protection Intended By 42 U.S.C. § 1983.

A Section 1983 case is a "species of tort liability,"[54] a statutorily created "constitutional tort"[55] that sweeps within its ambit all governmental actions that impair Bill of Rights protections. Section 1983 was intended to provide "a uniquely *federal* remedy"[56] with "broad and sweeping protection"[57] "to secure private rights against government encroachment"[58] "read against the background of tort liability that makes a man responsible for the natural consequences of his actions"[59] so that individuals in a wide variety of factual situations are able to obtain a *federal* remedy when their *federally* protected rights are abridged.[60] While read against the general common law tort background, "[t]he coverage of the statute [§ 1983] is . . . broader" than tort law,[61] and must be broadly and liberally

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54 *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994).

55 *Jefferson v. City of Tarrant*, 522 U.S. 75, 78-79 (1997); *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978).

56 *Mitchum v. Foster*, 407 U.S. 225, 239 (1972); emphasis added.

57 *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543 (1972) [quoting with approval].

58 *Inyo County v. Paiute-Shoshone Indians*, 123 S.Ct. 1887, 1894 (2003).

59 *Monroe v. Pape*, 365 U.S. 167, 187 (1961), overruled in part, to expand government liability, in *Monell*, 436 U.S. 658.

60 *Burnett v. Grattan*, 468 U.S. 42, 50, 55 (1984).

61 *Kalina v. Fletcher*, 522 U.S. 118, 124-125 (1997).

construed to achieve its goals.[62] Its "goals" are straightforward: **"to provide compensatory relief to those deprived of their *federal* rights by state actors"**[63] **by "interpos[ing] the *federal courts* between the States and the people, as guardians of *the people's federal rights.*"**[64] To effectuate those goals, Congress intended to "throw open the doors of the United States courts" to those who had been deprived of constitutional rights "and to provide these individuals *immediate access to the federal courts* . . . ."[65]

But in cases like the one at bench, property owners find this Court's holdings obverted. Instead of interposing the federal courts as the citizen's protector against local government, the system interposes state law as a barrier between the citizen and the federal courts.

Contrary to this Court's section 1983 holdings, property owners — and they alone — find the doors of the United States courts not merely hard to open, but barred. (See Buchsbaum, *supra*, in ABA, *Taking Sides on Takings Issues* at 477; Brian Blaesser, *Closing The Federal Courthouse Door On Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 Hofstra Property L.J. 73 [1988].)

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62 *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989); *Lake Country Estates v. Tahoe Reg. Plan. Agency*, 440 U.S. 391, 399-400 (1979).

63 *Felder v. Casey*, 487 U.S. 131, 141 (1988); emphasis added.

64 *Mitchum*, 407 U.S. at 243; emphasis added.

65 *Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 (1982); emphasis added.

B. The Lower Courts' Application Of *Williamson County* Denies Property Owners Their 7th Amendment Right To A Jury Trial Under *City Of Monterey*.

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) made another major post-*Williamson County* change in regulatory taking law.

In *City of Monterey*, this Court held as a matter of first impression that plaintiffs in section 1983 litigation — specifically, property owners like the ones involved there and here — have a 7th Amendment right to a jury trial on the issue of liability. That, as this Court recognized in *City of Monterey*, 526 U.S. at 719, is in stark contrast to the practice in state courts generally, which don't submit regulatory taking liability issues to juries.[66] But the trial court in *City of Monterey* did, and this Court affirmed.

Others have recognized the potentially significant change this means for regulatory taking litigation. (E.g., Meacham, *supra*, 32 Urb. Law. at 240, 242-243.)

By denying Mr. Kottschade federal court access, the courts below denied his 7th Amendment right to obtain a jury determination of the city's liability. This Court could not have considered that issue when it decided *Williamson County* 17 years earlier. It merits consideration now.

CONCLUSION

American property owners have become the proverbial pea in a jurisdictional shell game. Unlike all other victims of federal constitutional violations, their

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66 For a recent example of such refusal, see *Cumberland Farms v. Town of Groton*, 808 A.2d 1107 (Conn. 2002).

attempts to seek justice in federal court are rebuffed. They are told to sue in state court. When they do so, their adversaries can unilaterally remove the cases to federal court. Once removed, the plaintiffs find their removed cases dismissed (on motion of the removing defendants!) and are told to litigate in state court — where they filed in the first place. With the utmost respect, that isn't law; it is a parody usually found only in the legal humor sections of libraries. (See, e.g., Arthur Train, *Mr. Tutt Plays It Both Ways*, in *Mr. Tutt's Case Book* 413 [Charles Scribner's Sons 1948].) In the process, lower federal courts have abandoned their traditional roles as guardians of the constitutional rights of American citizens, leaving them to wander through a procedural maze that has no federal exit.

Petitioner prays that certiorari be granted so that this "anomalous . . . gap in Supreme Court jurisprudence," as the court below gently called it, can be rectified.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 02-1504MN

Franklin P. Kottschade, Appellant	*	
v.	*	
City of Rochester, Appellee	*	
Am. Forest & Paper Ass'n; Bldg. Indus. Legal Defense Fund of Southern Cal.; Cal. Bldg. Indus. Ass'n; Int'l Council of Shopping Centers; Nat'l Ass'n of Indus. & Office Properties; Nat'l Ass'n of Real Estate Investment Trusts; National Ass'n of Real Estate Investment Trusts; Nat'l Ass'n of Realtors; Real Estate Roundtable; and Rochester (Minnesota) Area Builders, Amici on Behalf of Appellant League of Minnesota Cities; Nat'l League of Cities; and Int'l Municipal Lawyers Association, Amici on Behalf of Appellee.	*	On Appeal from the United States District Court for the District of Minnesota.

App. 2

Submitted: October 10, 2002
Filed: February 13, 2003

Before RILEY, RICHARD S. ARNOLD, and SMITH, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

Franklin P. Kottschade, a developer, brought this claim under 42 U.S.C. § 1983 against the City of Rochester, charging that the City had taken his property for public use without just compensation, in violation of the Fifth Amendment. He now appeals from a District Court[1] dismissal for failure to state a claim upon which relief can be granted. Because Mr. Kottschade has not exhausted his state court remedies, as required by current takings jurisprudence, we affirm the District Court's dismissal of his complaint.

In the mid-1990's Mr. Kottschade sought a conditional use permit from the City of Rochester to build a townhouse project on a 16.4 acre parcel of property which he had acquired in 1992. In June of 2000, the City granted him a permit for a townhouse project on part of his property, subject however to nine specific conditions. These conditions included requirements that provisions be made for increased vehicular and pedestrian traffic, storm water management, and dedicated parkland. Mr. Kottschade alleges that the nine conditions, taken together, which were placed on his proposal to build townhouses on the land, were out of proportion to the impact this development of the property would have had on the City of Rochester, and that they rendered the project an

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[1] The Hon. Ann D. Montgomery, United States District Judge for the District of Minnesota.

economic impossibility, thus in effect taking his property without just compensation.

Mr. Kottschade unsuccessfully appealed both to the city's zoning Board of Appeal and to the city's Common Council to eliminate all of the conditions. He then filed this action challenging the constitutionality of the conditions attached to the permit, and requesting just compensation under the Fifth Amendment. The City of Rochester moved to dismiss, arguing that, under Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), Mr. Kottschade could not bring a constitutional takings claim in federal court before obtaining a final decision from the city, and that the suit was wrongly brought in federal court in the first instance since it was not yet ripe, given that state court procedures remained available to the plaintiff.

The District Court dismissed the action, concluding that until Mr. Kottschade sought relief in a state-court inverse-condemnation action and had relief denied, the claim of taking without just compensation was not ripe for decision in a federal court. In this appeal Mr. Kottschade argues that the Supreme Court decisions in Williamson and City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), when read together, permit him to bring a claim for relief under the Fifth Amendment Just Compensation Clause in federal court in these circumstances.

I.

We review a District Court's grant of dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim de novo. All facts alleged in the complaint are taken as true and construed in the light most favorable to the plaintiff. Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994). A motion to dismiss should not be granted unless the plaintiff can prove no set of facts entitling him to relief. Such is the case here,

and so we affirm the District Court's dismissal of the claim. Until Mr. Kottschade has exhausted his state court remedies, his claim may not be brought in federal court.

Mr. Kottschade's constitutional claim is brought under the Just Compensation Clause of the Fifth Amendment, which provides, "[N]or shall private property be taken for public use, without just compensation." Mr. Kottschade argues that dismissal of his claim by the District Court was improper because, despite the Supreme Court's holding in Williamson, the 1997 City of Chicago decision modifies the earlier case in such a way as to permit him to seek a remedy initially in federal court. He asks us to reconcile these two Supreme Court holdings. The plaintiff requests that this Court acknowledge that City of Chicago has modified the requirements laid out in Williamson with respect to procedures plaintiffs must follow in seeking just compensation for takings of property. Under Williamson, a property owner "has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation." 473 U.S. at 195. City of Chicago is said to have modified this holding by permitting plaintiffs in takings cases to file claims in federal court first as a matter of course. We have held that these procedures include the filing and prosecution of an action for inverse condemnation in the state courts. McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997); Collier v. City of Springdale, 733 F.2d 1311, 1317 (8th Cir. 1984).

What the plaintiff actually asks is that this Court find that the Supreme Court's decision in City of Chicago overrules Williamson in part, specifically its holding that "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure

and been denied just compensation." 473 U.S. at 195. But as the District Court noted, City of Chicago's holding addresses only the question of federal-question jurisdiction over a ripe takings claim. It does not explicitly answer the question of what is necessary to render a takings claim ripe. The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in Williamson in the context of takings cases. The requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, may be anomalous. Nonetheless Williamson controls the instant case. Compare this perceived gap in Supreme Court jurisprudence with this Court's observations in Commonwealth of Puerto Rico v. Branstad, 787 F.2d 423 (8th Cir. 1986). There this Court declined to declare that a Civil War case, Com. of Kentucky v. Dennison, 24 How. 66 (1861), had been implicitly overruled, while registering its view that the holding of the case had been substantially eroded. Within a year the Supreme Court had overruled Dennison. Puerto Rico v. Branstad, 483 U.S. 219 (1987). Whether something similar should occur here is for the Supreme Court to say, not us.

The Supreme Court in Williamson defined the exhaustion requirement to include judicial as well as administrative remedies: "the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate." 473 U.S. at 193. Unlike the appellee in Williamson, who had not sought variances from a planning commission's imposition of requirements for development, Mr. Kottschade has already sought variances, which have been denied. However, he has not yet pursued a postdeprivation remedy in state court, as is required by Williamson and subsequent jurisprudence.

The plaintiff points out, and justly so, that if he is required to seek a postdeprivation remedy in a state-court inverse-condemnation action, he may end up being altogether denied a federal forum for what is undoubtedly a federal right. Such a federal forum, he urges, is guaranteed by 42 U.S.C. § 1983 and its jurisdictional counterpart, and a plaintiff has a right to bring a § 1983 claim in a federal trial court, at his option. If plaintiff must go to the state courts, he would presumably need to show, in order to prevail in an inverse-condemnation action, that a taking had occurred, and that just compensation had not been paid. If the state courts hold for the plaintiff, then all is well, from his point of view, and there would be no need for recourse to a federal forum. But if they hold against him, for example, on the ground that no taking has occurred, doctrines of former adjudication may be a bar to a new action under § 1983 in a federal trial court. The difficulty is not unlike that which arises when a federal court decides to abstain from the exercise of jurisdiction, remitting the plaintiff, in the first instance, to his state remedies. See Note, Consequences of Abstention by a Federal Court, 73 Harv. L. Rev. 1358, 1365-68 (1960). In the abstention context, the Supreme Court has held that a plaintiff required to resort first to the state courts may reserve his federal claims, submitting to the state courts only claims arising under state law. In this way, if the plaintiff loses in the state courts, his way to the federal forum will not be barred by doctrines of former adjudication. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964). Plaintiff suggests that a similar framework would be at least a partial solution to his problem. If he must go to the state courts first, he says, we should hold now that whatever those courts do adverse to the plaintiff will not bar him from later filing a federal case on his Takings Clause claim.

The suggestion has the virtue of logic and is tempting, but we think the part of prudence is to decline it at this stage of the case. We do not know what the result of any state-court

action may be. Perhaps plaintiff will win in the state courts. Perhaps he will lose there, but then obtain Supreme Court review on the merits, a review that would at least afford him an appellate federal forum and would be unquestionably conclusive on the lower federal courts. Plaintiff may seek to reserve his federal claims when he files his state-court complaint, and the state courts, by analogy to England, might honor this reservation. Other possibilities suggest themselves. The point is this: it is simply too early to say now exactly what res judicata or collateral-estoppel argument might be appropriate in the future, and exactly what the answers to any such argument might be. We understand that deferring a decision on this point is frustrating to the plaintiff, but the federal courts do not sit to decide questions in the abstract. If the plaintiff goes to the state courts and loses, and then files a 42 U.S.C. § 1983 action in a federal court, that court, subject to appropriate appellate review, will be in a much better position to determine the effect of the prior state-court adjudication.

The judgment of the District Court, dismissing the complaint for failure to state a claim on the ground that the case is not yet ripe under the Williamson line of authority, is affirmed. This action is without prejudice to the right of the plaintiff, if he files a state-court case and loses, to file a new action in a federal court and make whatever arguments he wishes with respect to the effect of the prior state-court adjudication.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1504

Franklin P. Kottschade,	*	
Appellant,	*	
vs.	*	Order Denying Petition for Rehearing and for Rehearing En Banc
City of Rochester,	*	
Appellee	*	
American Forest and Paper Association, et al.	*	
Amici on Behalf of Appellant,	*	
League of Minnesota Cities; National League of Cities; and International Municipal Lawyers Association,	*	
Amici on Behalf of Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

March 21, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Franklin P. Kottschade

Plaintiff,

v.

The City of Rochester,

Defendant.

MEMORANDUM OPINION AND ORDER

Civil No. 01-898 ADM/AJB

George O. Ludcke, Esq., Kelly & Berens, P.A., Minneapolis, MN, appeared on behalf of Plaintiff.

Clifford M. Greene, Esq., and Pamela VanderWiel, Esq., Greene Espel, P.L.L.P, Minneapolis, MN, appeared for and on behalf of Defendant.

I. INTRODUCTION

On November 21, 2001, the Motion on Dismiss and for Summary Judgment [Doc. No. 7] of Defendant City of Rochester ("Defendant") was argued before the undersigned United States District Judge. The City moves for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief can be granted. For the reasons set forth below, the Motion to Dismiss [Doc. No. 7] is granted.

II. BACKGROUND

A complete recitation of the facts in this case would be long and complicated.[1] Boiled down to the occurrences

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[1] The fact statement alone spans 16 pages of Plaintiff's Response Brief.

bearing upon this motion, the relevant background is as follows.

In February, 2000, Plaintiff Franklin P. Kottschade ("Plaintiff") sought a conditional use permit from Defendant to build a townhouse project on his property. Defendant panted Plaintiff's application to rezone his property to accommodate the development, and approved Plaintiff's General Development Plan. Amended Complaint at ¶¶9,19. However, this approval was subject to nine specified conditions, Id. Plaintiff alleges the conditions impose burdens which render the project economically unfeasible. Pl. Resp. at 2. Plaintiff's compromise attempts to eliminate the conditions have been rejected, and he was unsuccessful in pursuing "various administrative procedures" to eliminate the conditions. Id. Plaintiff applied for a variance, seeking a waiver from compliance with all nine conditions. Complaint at ¶20. Plaintiffs petition for a variance was denied by both the Defendant at the zoning board and council levels. Id. at ¶¶22-23. Defendant asserts that each of the nine conditions reflect an application of preexisting ordinances and regulations applicable to all development projects. Def. Mem. in Supp. at 3; Adkins Aff., Ex. B. Plaintiff challenges the constitutionality of the conditions attached to the permit granted by Defendant. Plaintiff has styled his cause of action as a federal takings claim under 42 U.S.C.§1983, rather than a state court inverse condemnation claim.

III. DISCUSSION

The Federal Rules of Civil Procedure provide that a party may move to dismiss claims for lack of jurisdiction over the subject matter under Fed. R. Civ. P.12(b)(1), and for failure to state a claim upon which relief can he granted under Fed. R. Civ. P.12(b)(6). In considering a motion: to dismiss, the pleadings are construed in the light most favorable to the nonmoving party, and the facts alleged in the Complaint must be taken as true. Hamm v.

Groose, 15 F.3d 110,112 (8th Cir. 1994); Ossman v. Diana Corp., 825 F.Supp. 870, 879-80(D. Minn. 1993). Any ambiguities concerning the sufficiency of the claims must be resolved in favor of the non-moving party. Ossman, 825 F.Supp. at 880.

The parties agree that the threshold issue in this case is whether Plaintiff can bring a constitutional takings claim in federal court in federal court in the first instance, or whether Plaintiff must first seek compensation through state procedures. Defendant argues that Williamson county Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), prevents Plaintiff from bringing his takings claim in federal court without first exhausting the state law mechanisms available for seeking just compensation. Defendant relies on the Supreme Court's holding that "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" Williamson, 473 U.S. at 195 (quoting Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984)).

Plaintiff responds that City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997), overrules Williamson and allows a takings claim to be brought directly in a federal venue. Plaintiff relies on the conclusion in College of Surgeons that "the District Court properly exercises federal question jurisdiction over the federal claims in [Respondent's] complaints . . . " College of Surgeons, 522 U.S. at 166. Plaintiff reasons that because (1) claims can only be removed to federal court under 28 U.S.C. § 1441(a) if the district court has original jurisdiction, and (2) the claims removed in College of Surgeons were Due Process, Equal Protection, and takings claims, therefore it necessarily follows that (3) the district courts of the United States must have original jurisdiction over takings claims. Pl. Resp. at 22.

As both parties candidly concede, the dispositive

determination in this case is whether or not College of Surgeons overrules the Williamson precedent. It does not.

A. Williamson

In Williamson, the Court granted certiorari to address the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been temporarily "taken" by the application of government regulations, Williamson, 473 U.S. at 185. The Court did not reach that question, however, finding instead that the takings claim, *inter alia*[2] was premature because respondent had not utilized state procedures provided for obtaining just compensation. Id at 186.

Because the Fifth Amendment does not proscribe takings, *without just compensation*, no constitutional violation occurs until just compensation has been denied, Id. at 145 n.13. "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." Id. Therefore, a property owner simply has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation. Id. at 195.

In discussing the procedure for bringing a takings claim, the Court stated that "[*i*]f the government has provided an adequate process for obtaining compensation, and if **resort** to that process 'yield[s] just compensation,' then the property owner 'has

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[2] The Williamson Court also held that Respondent had not obtained a final decision regarding the application of the challenged zoning ordinance and subdivision regulations. Id. at 187. Both the absence of a final decision and the failure to exhaust state procedures were independent reasons why Respondent's claim was not ripe. Id. at 187, 194, 200.

no claim against the Government' for a taking." Id. at 194-195 (quoting Ruckelshaus v. Monsanto Co., 467 U.S., 986, 1013, 1018 n.21 (1984)). Under this exhaustion requirement, takings claims are premature until the property owner has availed itself of the state process provided for seeking redress.[3] See Id. at 195.

The State of Minnesota provides a process by which plaintiffs may be compensated for any takings of property. Pursuant to the Minnesota Constitution, Article I, section 13, private property may not be taken, destroyed or damaged for a public purpose without just compensation. To enforce this provision, a plaintiff may bring an inverse condemnation action by petition for writ of mandamus. Wilson v. Ramscher, 352 N.W. 2d 389, 394 (Minn. 1984). Plaintiff has not shown that the existing state procedures are either unavailable or inadequate, and until he has utilized those procedures, a federal takings claim is not ripe for adjudication. See id. at 197.

B. College of Surgeons

Plaintiff contends that College of Surgeons overrules the Williamson exhaustion requirement. In College of Surgeons, the Supreme Court was asked to consider whether a lawsuit filed in state court seeking judicial review of decisions of a state agency, the Chicago Landmarks Commission, may be removed to federal district court, where the case contains both federal constitutional and state administrative challenges. College of Surgeons, 522 U.S. at 169. While the claims in College of Surgeons were raised through a cause of action created by state law, the state court complaint raised a number of issues of federal law in the form of various federal

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[3] Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195.

constitutional challenges.[4] Id. at 164. The case was removed on the basis of federal question jurisdiction, and the District Court exercised supplemental jurisdiction over the state law claims to grant summary judgment in favor of the Defendant. On review, the Seventh Circuit concluded that the District Court was without jurisdiction, holding that deferential review of state agency action was an appellate function not consistent with the character of a court of original jurisdiction. Id. at 161-162. The Seventh Circuit elaborated that the "facial constitutional challenges [were] independent of the record and so would be removable to federal court if brought alone." Id. at 162. The crux of the court's decision was that, because some of the supplemental state law claims involved deferential review, the removed case as a whole could not be termed a "civil action" of which the district courts have original jurisdiction under 28 U.S.C.§1441. Id.

The Supreme Court granted certiorari to address "whether a case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of the federal district courts." Id. at 163. In analyzing this questions, Justice O'Connor, writing for the Court, concluded that the federal constitutional challenges raised in the state court complaint established federal question jurisdiction under 28 U.S.C.§1331 because a " 'right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action.'" Id. at 163-164 (quoting Gully v. First Nat.

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[4] The multiple federal constitutional claims in College of Surgeons included claims that the challenged ordinances, both on their face and as applied, violated the Due Process and Equal Protection Clauses and effected a taking of property without just compensation under the Fifth and Fourteenth Amendments, and the manner in which the state agency conducted its administrative proceedings violated Respondent's rights to due process and equal protection. Id. at 160.

Bank in Meridian, 299 U.S. 109, 112 (1936)). The holding emphasizes that a cause of action created under state law might still "arise under" the laws of the United States if the right to relief under state law requires resolution of a substantial question of federal law. Id. at 164. The Court concluded that "the District Court properly exercised federal question jurisdiction over the federal claims in [Respondent's complaint] . . . " Id. at 165. Important to the instant case, the tenor of the College of Surgeons decision is that a ripe takings claim, coupled with multiple other constitutional claims, is properly the basis for removal on federal question jurisdiction. The decision does not speak to the underlying qualifications for ripeness of such a claim.

The Court then proceeded to address the precise issue on which it had granted certiorari. To that end, the Court clarified the propriety of exercising supplemental jurisdiction in particular instances. Specifically, the Court held that because the accompanying state law claims in College of Surgeons formed part of the "same case or controversy" as the federal claims under 28 U.S.C.§1367(a), the exercise of supplemental jurisdiction over those claims was proper. Id. at 165-166. The Court explained that the District Court's original jurisdiction derived from the federal claims, not the state law claims, and thus the action was properly a "civil action" within the original jurisdiction of the district courts for purposes of removal. Id. at 166.

College of Surgeons does not discuss, elucidate or alter the established standards for determining federal question jurisdiction. The Court simply "explained" that "the facial and as-applied federal constitutional claims raised by [Respondent] 'arise under' federal law for purposes of federal question jurisdiction." Id. at 167-168. The Court never specified which of the various federal claims was sufficient for jurisdiction, but merely noted that they were, *in sum* sufficient to establish federal question jurisdiction for removal

purposes. No language in the College of Surgeons case operates to alter prior law regarding federal question jurisdiction in federal courts, or the exhaustion requirement for takings claims. The Court's conclusion in College of Surgeons is directly responsive to the question on which the Court granted certiorari: "[t]he District Court properly recognized that it could exercise supplemental jurisdiction over [Respondent's] state law claims, including the claims for on-the-record administrative review of [state agency] decisions."[5] Id. at 174.

College of Surgeons addresses the issue of supplemental jurisdiction; it is not a case purporting to overturn the Williams exhaustion requirement for the ripeness of a constitutional takings claim. In discussing the significance of College of Surgeons, the Fourth Circuit noted that: "[College of Surgeons] *merely holds* that district courts can exercise supplemental jurisdiction over state claims that call for deferential on-the-record review of state administrative findings when the district court already possesses original jurisdiction over another claim." Kirkpatrick v. Lenoir County Bd. Of Educ., 216 F.3d 380, 387 n.6 (4th Cir. 2000) (emphasis added). As a matter of law, College of Surgeons simply does not overrule Williams. Therefore, the exhaustion requirement for ripeness of a constitutional takings claims is unaffected and remains good

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[5] In dissent, Justice Ginsburg reiterated the nature and scope of the Court's ruling by characterizing Justice O'Connor's opinion as an "authorization of cross-system appeals" for "on-the-record review of state and local agency actions." Id. at 175-176. That the function of the College of Surgeons case was to clarify the law of supplemental jurisdiction, not to alter the law of federal question jurisdiction, is further supported by Justice Ginsberg's description of the majority's opinion: "all this Court is willing to say is that 'the District Court properly exercised federal question jurisdiction over the federal claims . . . .'" Id. at 188. "The Court's opinion expresses 'no [further] view.'" Id.

law.[6]

Therefore, until Plaintiff seeks relief in a state court inverse condemnation action and relief is denied, the claim of taking without just compensation is not ripe for decision by a federal court. Accordingly, this Court does not have jurisdiction, and no claim upon which relief can be granted has been stated. Defendant's Motion to Dismiss is granted.

IV. CONCLUSION

Based on the foregoing, and all the files, records and proceedings herein, IT IS HEREBY ORDERED that the City of Rochester's Motion to Dismiss [Doc. No. 7] is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY,

BY THE COURT
ANN D. MONTGOMERY
UNITED STATES
DISTRICT JUDGE:

Date: January 22, 2002

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[6] The Supreme Court reaffirmed the Williamson exhaustion requirement in City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710, 714-715, 721 (1999) (no constitutional injury from a taking alone, therefore "[a] federal court . . . cannot entertain a takings claims under §1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy"). The Williamson exhaustion requirement has also been recently relied upon by the Eighth Circuit. In Carpenter Outdoor Advertising Co. v. City of Fenton, et. al., No. 00-1869 (8th Cir. June 1, 2001), the court upheld the dismissal of a claim based on the Just Compensation Clause of the Fifth Amendment where the appellant had not followed state procedures because " '[t]he general rules is that a plaintiff must seek compensation through state procedures before filing a federal takings claim." Carpenter, slip op. at 6 (citing Von Kerssenbrock-Praschma v. Saunders, 121 F.3d 373, 379 (8th Cir. 1997); Williamson, 473 U.S. at 194-195.

Lexis

(8)

Supreme Court, U.S.
FILED
AUG 25 2003
OFFICE OF THE CLERK

Case No. 02-1848

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

FRANKLIN KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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37 pp

QUESTIONS PRESENTED

1. In its 1997 decision in *City of Chicago v. International College of Surgeons*, did this Court overrule the second prong of its 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, even though this Court and federal courts throughout the nation continue to enforce *Williamson's* second prong?

2. If this Court has not already overruled *Williamson*'s second prong, should it do so in this case?[1]

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[1] To the extent that the Petition purports to raise other issues, those issues were abandoned below, either by Petitioner's representations to the District Court, or by his failure to raise them in his Complaint, or brief in opposition to the City's Motion to Dismiss in the District Court, or Fed. R. App. P. 10(b)(3)(a) Statement of the Issues, or his failure to brief those issues to the District Court or the Court of Appeals.

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BRIEF OF RESPONDENT IN OPPOSITION

The Petition attacks the lower courts' straightforward application of a century-old principle of constitutional law to an ordinary set of facts. The Takings Clause of the United States Constitution does not proscribe mere "takings" of property, but only "takings without just compensation." *Brown v. Legal Found. of Wash.*, -- U.S. --, 123 S. Ct. 1406, 1419 (2003); *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 658-59 (1890). Thus, where state law provides an adequate avenue for seeking compensation for alleged takings of property, an essential element of a takings claim is not present unless the plaintiff has pursued such avenues and failed to obtain just compensation. This requirement is now known as the "second prong" of the *Williamson* rule. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

This federal takings suit is Petitioner Franklin Kottschade's first and only attempt to obtain compensation for an alleged taking. He bypassed undisputedly adequate avenues for seeking compensation under Minnesota law. He has not attempted to fit this suit within any recognized exception. Instead, he advances two alternative positions: either this Court overruled *Williamson's* second prong in the supplemental jurisdiction case of *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156 (1997), or it should overrule *Williamson* now.

Neither Kottschade nor his amici have cited any opinion of any judge of any court in this nation agreeing with their position on either issue, even in dictum or in dissent. Thus, there is no conflict for the Court to

resolve, and remarkably little legal authority for their position. The fact that Petitioner, advocates for special interests, and one distinguished professor disagree with the reasoning and consequences of *Williamson* does not make this case worthy of this Court's review.

Moreover, review of this case would require this Court to engage in an excessive degree of speculation, for reasons solely of the Petitioner's own creation. Kottschade complains about the consequences of pursuing state-law procedures, but has ensured that those consequences are speculative and hypothetical by refusing to embark down that path. Like the Court of Appeals below, this Court should decline to answer those questions in the abstract setting Petitioner has created.

STATEMENT OF THE CASE

Petitioner brought a suit in federal court presenting a single legal theory – that the City of Rochester took his property without just compensation in violation of the United States Constitution. His suit was dismissed because he was required by this Court's rulings to seek relief first under state law before filing a federal takings claim, and he did not.

The Eighth Circuit faithfully followed this Court's precedents and affirmed the dismissal. *Kottschade v. City of Rochester,* 319 F.3d 1038 (8th Cir. 2003). His petitions for rehearing failed. There was no dissent from the panel ruling below and no vote in favor of panel rehearing or rehearing en banc.

REASONS FOR DENYING THE PETITION

I. THE PETITION AND AMICI CONFUSE THE ACTUAL ISSUE DECIDED BELOW.

The courts below decided a single question: whether "prong two" of *Williamson* required Kottschade to first seek relief as a matter of state law before his federal-law takings claim could be complete. The courts below did not decide that a defendant may lawfully remove an unripe takings claim. They did not decide that state-court takings decisions have issue-preclusive effect in subsequent federal suits. The lower courts did not decide those questions because the facts of this case do not present them. If the Court is interested in deciding those questions, it should wait for a case that presents them.

II. THE PETITION FAILS TO SATISFY ANY OF THIS COURT'S CRITERIA FOR A GRANT OF CERTIORARI.

A. No Court Has Agreed With Petitioner's Arguments, So No Genuine Conflict Among the Circuits Exists.

As this Court has recognized, "the principal purpose for which [this Court uses its] certiorari jurisdiction . . . is to resolve conflicts among United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). This case does not fulfill that "principal purpose," however, because it was filed in an *unsuccessful* effort to *create* a conflict between the circuits.

The Petition may be distilled down to two issues: whether this Court overruled *Williamson*'s second prong in its 1997 *International College of Surgeons* decision, and if not, whether it should do so now. No court has ever answered "yes" to either question. To the contrary, virtually every U.S. court of appeals has continued to uphold this important principle of federal takings law, before and after *International College of Surgeons* was issued.[2] *See, e.g., Tower v. Leslie-Brown,* 326 F.3d 290, 297-98 (1st Cir. 2003); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 89 (2d Cir. 2002); *Cowell v. Palmer Township,* 263 F.3d 286, 290 (3d Cir. 2001); *Greenspring Racquet Club Inc. v. Baltimore Co., Md.,* 232 F.3d 887 (table), 2000 WL 1624496, at *4 (4th Cir. 2000), *cert. denied,* 532 U.S. 957 (2001); *John Corp. v. City of Houston,* 214 F.3d 573, 581 (5th Cir. 2000); *Gabhart v. City of New Port,* 208 F.3d 213 (table), 2000 WL 282874, at *3 (6th Cir. 2000); *Forseth v. Vill. of Sussex,* 199 F.3d 363, 370 (7th

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[2] The only U.S. court of appeals that has not issued a decision after *International College of Surgeons* enforcing *Williamson's* second prong is the Court of Appeals for the District of Columbia Circuit, which does not appear to have reviewed a case presenting the opportunity. The District Court for the District of Columbia, however, has continued to apply *Williamson*'s second prong. *See Dist. Intown Properties Ltd. P'ship v. District of Columbia,* 23 F. Supp. 2d 30, 32-35 (D.C.C. 1998) (applying *Williamson*'s second prong and finding the takings claim ripe because "District law does not provide procedures to compensate plaintiffs for the denial of their building permit applications"), *aff'd,* 198 F.3d 874 (D.C. Cir. 1999), *cert. denied,* 531 U.S. 812 (2000). The District, which prevailed on the merits of the takings claim in both courts, does not appear to have challenged the District Court's *Williamson* analysis on appeal.

Cir. 2000); *Carpenter Outdoor Advertising Co. v. City of Fenton*, 251 F. 3d 686, 690-91 (8th Cir. 2001); *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1100 (9th Cir. 1998); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322 (10th Cir. 1998); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1231 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000); *Greenbrier v. United States*, 193 F.3d 1348, 1358 n.14 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1274 (2000).

Kottschade himself acknowledges the absence of a conflict, by complaining in the Petition that dismissal of takings claims brought first in federal court "has been the *consistent lower court treatment* since *Williamson County*." (Pet. at 9 (emphasis added)).

At most, amicus Daniel Mandelker suggests there is a conflict between the courts of appeals on whether a loss in state court while complying with *Williamson's* second prong should be given issue-preclusive effect in a subsequent federal takings suit. (Amicus Brief of Mandelker at 8-11).[3] However, that was not at all the question decided below. The Court of Appeals did not need to answer that question, and specifically declined

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[3] The Petition itself ignores this conflict, presumably for strategic reasons. Petitioner would prefer that this Court believe that *Williamson County's* second prong creates a complete barrier to the federal courts, by sending takings plaintiffs to state court and then estopping them from relitigating issues upon their return. As noted by the Court below, it is not clear whether issue preclusion would apply in that setting, but the question should not be decided in the abstract setting now presented. *Kottschade*, 319 F.3d at 1041-42.

to do so. *Kottschade,* 319 F.3d at 1041-42. It is a question that will arise (if at all) after the Petitioner files *Kottschade II* in state court, loses, then files *Kottschade III* in federal court, and seeks to litigate the same issues a second time. As the briefs of other amici inadvertently demonstrate, other suits have directly presented the question of issue preclusion in a concrete setting, including suits that may reach this Court in the future. (*See* Amicus Brief of Pac. Legal Found. & San Remo Hotel at 1; Amicus Brief of Evandro S. Santini & Santini Homes, Inc. at 6-8.) Such suits provide a far better vehicle for considering the question than this one.

B. The Decisions Below Did Not Create a Conflict with this Court's Decisions.

By recognizing that Kottschade's refusal to file a state-law suit rendered his federal takings claim incomplete, the courts below created no conflict with modern decisions of this Court. Rather, those decisions were faithful to the explicit holding of *Williamson*.

In particular, the decisions below do not conflict with this Court's decision in *International College of Surgeons*. This Court's holding in *International College of Surgeons* merely plugged a hole that the Seventh Circuit briefly created in the supplemental jurisdiction of federal courts to consider state-law claims. *See Int'l Coll. of Surgeons,* 522 U.S. at 163. This Court had "granted certiorari to address whether a case containing claims that local administrative action violates federal law, but also containing state law claims for on-the-record review of the administrative findings, is within the jurisdiction of the federal district courts." *Id.* By answering "yes" to that question, this Court said nothing

about whether an unripe federal takings claim, by itself, can be filed in, or removed to, federal court. As this Court recently observed, "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001).

The parties in *International College of Surgeons* did not seek (or even need) to rely upon a federal takings claim as a basis for federal jurisdiction. The plaintiff's complaint in that action included a variety of other federal causes of action, which were more than sufficient to support federal jurisdiction, and, therefore, removal. As described by the District Court, the College's complaint also alleged that the Chicago Ordinance "violates equal protection by excluding religious organizations' church buildings from the Landmarks Ordinance without exempting other not-for-profit organizations," and "denies due process by authorizing the Commission to preliminarily designate property as a 'landmark' without affording the owners notice and an opportunity to object before the preliminary designation is applied." *Int'l Coll. of Surgeons v. City of Chicago,* Nos. 91 C 1587 & 5564, WL 6729, at *2 (N.D. Ill. Jan. 10, 1992). Those other federal causes of action were complete without the need to first seek compensation under state law.[4] Indeed, the

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[4] Petitioner contends that the other federal claims of the College are "of no moment" because "the same *Williamson* County ripeness rule has been applied to those claims." (Pet. at 8 n. 4.) Examination of the exact allegations of those other federal claims should suggest otherwise. As many U.S. Courts of Appeals have recognized, moreover, there is no reason to require the second prong of *Williamson* in non-takings claims, because those constitutional rights have no

federal takings claim had been dismissed by the District Court in an early Rule 12(b)(6) ruling. *Id.* at *4.[5]

The notion that this Court overruled *Williamson* in its *International College of Surgeons* decision is also contrary to this Court's most recent jurisprudence. Two

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counterpart to the "without just compensation" language of the Takings Clause. *See, e.g. John Corp. v. City of Houston,* 214 F.3d at 584; *McKenzie v. City of White Hall,* 112 F.3d 313, 317 (8th Cir. 1997); *Strickland v. Alderman,* 74 F.3d 260, 265 (11th Cir. 1996); *Acierno v. Mitchell,* 6 F.3d 970, 977 n.17 (3d Cir. 1993); *Southview Assocs., Ltd. v. Bongartz,* 980 F.2d 84, 96-97 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993); *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1404-07 (9th Cir. 1989), *cert. denied,* 494 U.S. 1016 (1990), *overruled on other grounds by Armendariz v. Penman,* 75 F.3d 1311, 1326 (9th Cir. 1996). These authorities further undermine the reasonableness of the Petitioner's logical leap (from the recognition of federal jurisdiction in *International College of Surgeons* to the conclusion that *Williamson's* second prong has been overruled).

[5] The City of Chicago sought dismissal of the federal takings claim in part under *Williamson's* second prong. *See Int'l Coll. of Surgeons,* 1992 WL 6729, at *4 n.3. The District Court did not address the jurisdictional flaw in the federal takings claim first, but addressed its merits and dismissed the takings claim without reaching the City of Chicago's *Williamson* argument. *Id.* Commentators have viewed this as an insignificant error. As Wake Forest University Law Professor Thomas Roberts has recognized, "[t]his apparent error was not noted by the Supreme Court, which is unsurprising since it was of no significance to the issue in the case." Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation,* 31 ENVRL. L. REP. 10353, 10365 (April 2001).

years after *International College of Surgeons,* this Court itself treated *Williamson's* second prong as alive and well in its decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687 (1999). At the conclusion of its ruling, which recognized a Seventh Amendment right to a jury trial in takings cases, this Court addressed the limitations of its holding. It reaffirmed that "a federal court . . . cannot entertain a takings claim under § 1983 unless or until the complaining landowner has been denied an adequate post deprivation remedy." 526 U.S. at 710.[6] Because *Williamson* has not been overruled, the lower courts' rulings created no conflict with rulings of this Court.

C. Review of this Case would Serve no Purpose but to Reaffirm or Overrule *Williamson* Itself, and the "Special Justification" for Overruling a Decision is Absent Here.

Petitioner and amici dislike the second prong of *Williamson* because they disagree with the reasoning behind it and they dislike or fear its effects. For those reasons, they wish it would go away. That strategy is

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[6] The continued vitality of *Williamson's* second prong in this Court's eyes is further reflected in other portions of the *Del Monte Dunes* decision. *See, e.g.,* 526 U.S. at 710. Del Monte Dunes "was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings . . . . Had the city paid for the property or *had an adequate post deprivation remedy been available,* Del Monte Dunes would have suffered no constitutional injury from the taking alone." *Id.* (emphasis added).

apparent not only from their attacks on a supposed "flaw at the core of *Williamson County*" (*See* Pet. at 19), but from their inability to present this Court with any saving construction of *Williamson's* second prong. Indeed, the applicability of *Williamson* to this case is so clear that the Court could hardly reverse the decisions below without entirely abolishing *Williamson*'s second prong. That cannot be an accident; those who seek radical shifts in the law are attracted to cases that offer the Court no middle ground. But from this Court's perspective, that feature should make this suit a less attractive candidate for review.

There are divisions among the lower courts about the full extent of *Williamson's* reach. U.S. courts of appeals disagree about whether *Williamson's* second prong applies to claims alleging a taking for a private purpose,[7] or whether *Williamson's* second prong applies to facial challenges.[8] The facts of this case, however, present this Court with no opportunity to resolve either of those conflicts. Kottschade brought an as-applied takings claim that does not dispute the public nature of the City's purpose.

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[7] *Compare Daniels v. Area Plan Comm'n v. Allen County,* 306 F.3d 445, 453 (7th Cir. 2003) (holding that prong two applies to private-purpose takings claims) *with Montgomery v. Carter County, Tennessee,* 226 F.3d 758, 770 (6th Cir. 2000) (holding that prong two does not apply).

[8] *Compare San Remo Hotel,* 145 F.3d at 1101-02 (holding that prong two applies) *with Daniels,* 306 F.3d at 458 n. 13 (holding that prong two does not apply).

1. The "special justification" needed to overrule an established precedent is not present in this case.

This Court has articulated the extraordinary circumstances that must be demonstrated before this Court will consider overruling a well-established precedent. A "special justification" is required, well beyond what the Petitioner and amici have provided in this case. As this Court recently noted in *Harris v. United States*, 536 U.S. 545 (2002):

> Stare decisis is not an "inexorable command," *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting), but the doctrine is "of fundamental importance to the rule of law," *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Even in constitutional cases, in which stare decisis concerns are less pronounced, we will not overrule a precedent absent a "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

Harris, 536 U.S. at 556-57.

The reasons that Petitioner and amici offer for overruling *Williamson* are insufficient to satisfy the "special justification" standard as applied by this Court. There has not been "a significant change in, or subsequent development of, our constitutional law" that destroys the vitality the principles upon which

Williamson was decided. *Contrast Agostini v. Felton*, 521 U.S. 203, 236 (1997).[9] In fact, the Petitioner's criticisms have nothing to do with intervening *changes* in constitutional, statutory, or common law. Petitioner's complaints about issue preclusion do not result from any intervening change in the law. They merely concern the manner in which certain courts have been applying principles of issue preclusion that were already established when *Williamson* was decided. Access to federal courts for other types of plaintiffs did not expand after 1985 in a manner that created or exacerbated an unfairness or inconsistency. The world has not changed so "as to have robbed the [*Williamson*] rule of significant application or justification." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992) (plurality) (citing *Burnet*, 285 U.S. at 412 (Brandeis, J., dissenting)). *Williamson's* second prong has not "proven to be intolerable simply in defying practical workability." *Casey*, 505 U.S. at 854 (citing *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965)).

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[9] Similarly, the "precedents before and after [*Williamson's*] issue" do not "contradict its central holding" in a way that creates uncertainty and "erodes" its foundations. *Contrast Lawrence v. Texas*, -- U.S. --, 123 S. Ct. 2472, 2483 (2003). *Cf. Lawrence*, 123 S.Ct. at 2489 (Scalia, J., dissenting) ("we should be consistent rather than manipulative in invoking the doctrine" of stare decisis).

2. Petitioner's pre-emptive attack on *Williamson* is the worst setting to consider the issues he raises.

Few derogatory adjectives are omitted from Petitioner's attack on the supposed effects of *Williamson's* second prong and issue preclusion. The City does not believe this Court has created a "diabolical trap," "Catch-22," "bait and switch," or "mess." But even if the Court happened to agree that prong two and preclusion can create an unfair outcome, granting review of this case is the worst of the available alternatives for redressing that supposed unfairness.

Because Petitioner refused to pursue state remedies, his case presents the Court with little more than an opportunity to affirm *Williamson* or perform a complete about-face and overrule it. By overruling *Williamson* the Court would risk injury to itself as an institution. As a plurality of this Court noted in *Casey*:

> There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

Casey, 505 U.S. at 864-66. Moreover, Petitioner's refusal to pursue state-law remedies leaves the Court no choice but to speculate about whether that state-court proceeding would have been conducted and resolved in

a way that precluded any subsequent federal takings suit.

By contrast, if the Court granted review of a takings case in which prior state-court findings had actually been given issue-preclusive effect in federal court, it could – *for the first time* – answer the questions of whether and when relitigation of issues should truly be forbidden in that setting. Although the questions may not be "certworthy" in either setting, this second alternative is far preferable than the present one.

The first alternative is an ax, the second, a scalpel. Only the second approach allows the Court to fine-tune the law by choosing from a range of alternatives.[10] Only the second approach resolves a conflict between the circuits. Only the second approach presents the supposed "unfairness" of issue preclusion in a concrete, rather than hypothetical, setting. Only the second approach avoids the risk that "legitimacy of the Court would fade with the frequency of its vacillation." *Id.*

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[10] For example, the Court might apply general preclusion principles notwithstanding the inability of the plaintiff to first file in federal court; the Court might interpret the "full and fair opportunity" element of issue preclusion to require a different result in certain circumstances; the Court might deny issue preclusion where an effective *"England"* reservation has been made, as mentioned by the Court of Appeals below; *Kottschade,* 319 F.3d at 1041-42 (citing *England v. La. State Bd. of Med. Exam'rs,* 375 U.S. 411 (1964)); or the Court might simply suspend the application of issue preclusion in takings cases.

D. Petitioner Needs this Court to Overrule Not Only its Decision in *Williamson*, But Over a Century of this Court's Other Precedents.

Williamson was not an aberration. The principles embodied in *Williamson's* second prong were articulated over a century ago, and have been consistently followed by this Court since then. This Court has continued to follow those principles after *International College of Surgeons*, and as recently as March 2003. Thus, Kottschade cannot simply ask this Court to overrule *Williamson*; he must ask this Court to disregard a line of decisions faithfully followed for over a century.

In explaining why landowners must seek "just compensation" and not simply wait for it to be tendered, the *Williamson* decision quotes language first articulated by the first Justice Harlan in *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 658-59 (1890), where this Court stated:

> It is further suggested that the act of congress violates the constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of constructing its road over them. This objection to the act cannot be sustained. The constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken; but the owner is entitled to reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed.

135 U.S. at 658-59 (emphasis added). This principle was soon applied to local takings. *See Sweet v. Rechel*, 159 U.S. 380, 400-407 (1895) (per Harlan, J.) (finding no taking without just compensation by a city because the commonwealth had enacted a statute providing an avenue for certain and adequate compensation for the taking). This Court continued to articulate these principles in a variety of different kinds of takings cases. *See, e.g., Joslin Mfg. Co. v. City of Providence,* 262 U.S. 668, 677 (1923) ("It has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, but that the requirement of just compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge."); *Hurley v. Kincaid,* 285 U.S. 95, 103 (1932)

(holding that the ability of landowner to seek compensation for taking under Tucker Act, after taking has occurred, makes injunction against taking unavailable); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) ("Where the action against which specific relief is sought is a taking, or holding, of the plaintiffs' property, the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment."); *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981) ("Such an alleged taking is not unconstitutional unless just compensation is unavailable."); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1013 (1984).

When *Williamson* was decided, only one justice dissented. *See Williamson*, 473 U.S. at 200 ("Justice White dissents from the holding that the issues in this case are not ripe for decision at this time.").

Williamson's second prong enjoys the strong support of the state and federal judiciaries. When many of the amici lobbied Congress to repeal *Williamson's* second prong through legislation, *See* H.R. 1534, S. 1204, S. 1256, S. 2271, 105th Cong, , those efforts were opposed by the Judicial Conference of the United States and the Conference of Chief Justices. The Judicial Conference concluded that it "would alter deeply ingrained federalism principles by prematurely involving the federal courts in property regulatory matters that have historically been processed at the state and local levels." S. Rep. No. 105-242, at 56-57 (1998). The Conference of Chief Justices, representing the highest courts of all 50 states, strongly opposed the

bill because it "would drastically change the traditional state and federal roles in 'takings' cases and upset the balance of our federal system in an area that is fundamentally a state and local matter." *Id.* at 56. The legislation failed in 1998, an outcome that attorneys for Kottschade and the amici attribute to "vehement" opposition to the repeal of *Williamson's* second prong.[11]

Just last term, this Court again quoted the principle underlying *Williamson's* second prong. In *Brown v. Legal Found. of Wash.*, this Court again noted that "t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." 123 S.Ct. at 1419 (quoting *Williamson).*

E. In this Case, the Court will be Unable to Reach the Merits of Petitioner's Seventh Amendment Argument.

This case is a particularly poor vehicle for this Court to take up a sub-issue presented in the Petition – whether *Williamson's* second prong results in a deprivation of the Seventh Amendment right to a jury trial. Petitioner refers to "the practice in state courts generally, which don't submit regulatory taking liability

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[11] Counsel for the amici American Forest and Paper Association et al., and one of Petitioner's counsel, have recognized that proposition in a 1999 law review article: "A vehement opposition ultimately defeated S. 2271 in the Senate. The main contention of the Bills' detractors focused on the current ripeness requirement that a property owner must first exhaust state compensation remedies prior to receiving a federal hearing on the merits of a taking." John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness" Mess*"? 31 URB. LAW. 195, 197 (1999).

issues to juries." (Pet. at 29.) Kottschade neglects to mention that Minnesota is a clear exception to this supposed "general practice." *See Alevizos v. Metro. Airports Comm'n*, 317 N.W.2d 352, 360 (Minn. 1982) (recognizing a right to a jury trial in an inverse condemnation suit); MINN. STAT. § 586.12 (providing for a jury trial in mandamus cases, the traditional proceeding for inverse condemnation). A case arising in Minnesota therefore does not present the question raised by Kottschade – whether requiring him to go first to state court will deprive him of a Seventh-Amendment right to a jury trial.

Moreover, in this particular case there is a clear procedural bar to this Court's consideration of the Seventh Amendment question. Kottschade raised a Seventh Amendment issue for the first time in his appellate brief, after omitting it from his Complaint, brief in opposition to the City's Motion to Dismiss and oral argument to the District Court, and Federal Rule of Appellate Procedure 10(b)(3)(a) Statement of the Issues.

III. THE PETITION CONTAINS MATERIAL MISREPRESENTATIONS.

Under Supreme Court Rule 15.2, respondents "have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." In compliance with that obligation, Respondent must call to the Court's attention

the following misstatements in the Petition, and correct them.[12]

A. The Petition and Amici Misrepresent This Court's Holding in *International College of Surgeons v. City of Chicago*.

Petitioner urges this Court to grant review so that it may "clarify" or "reconcile" *Williamson* and *International College of Surgeons*. However, Petitioner's solution for "reconciling" *Williamson* and *International College of Surgeons* is to negate the explicit holding of *Williamson*, based on implications contrived from a misreading of *International College of Surgeons*. A *straightforward* reading of both decisions leaves nothing for this Court to reconcile, and no unfairness for this Court to cure.

Under Kottschade's logic, this Court created an irrational double-standard in *International College of Surgeons* (under which defendants have access to

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[12] The Petition also makes a misleading reference to the outcome of an "ABA retreat," and states that "[t]he ABA retreat thereby ended by asking for judicial help in resolving the dissonance between *Williamson* and *City of Chicago*." (Pet. at 7.) As noted in the introduction to the report, "[t]he Retreat did not advocate change in the essentials of the *Williamson County* ripeness requirements" because "[t]here was no consensus on such changes." TAKING SIDES ON TAKINGS ISSUES at 570 (Thomas E. Roberts ed., 2002). Moreover, "the Section [on State and Local Government Law] did not endorse or adopt the retreat report" and "[t]hus, the retreat report should not be cited as reflecting the position of the ABA or the ABA Section of State and Local Government." *Id.* at 567.

federal courts in regulatory takings cases, and plaintiffs do not). Kottschade's syllogism rests on a provably false premise. As explained above in Section II(B), federal jurisdiction was present in *International College of Surgeons* in spite of, not because of, the plaintiff's inclusion of a federal takings claim. An accurate account of the College's claims destroys the supposed implication that *Williamson* was impliedly overruled. It also destroys the supposed implication that defendants in takings claims receive preferential access to federal courts under the combined effect of *Williamson* and *International College of Surgeons.*

Under a fair reading of the two decisions, an unripened federal takings claim, by itself, cannot create federal jurisdiction – whether that jurisdiction is sought by a plaintiff or by a removing defendant.[13] The U.S. Court of Appeals for the Fifth Circuit recently

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[13] Thus, when a defendant removes an incomplete, "pure" takings claim, other federal courts have ordered a remand because of a lack of federal jurisdiction. *See, e.g., Eggleston v. Pierce County,* 99 F. Supp. 2d 1280, 1282 (W.D. Wash. 2000) ("I find that the removal by Defendants of plaintiff's inverse condemnation state claim to federal court is improper pursuant to the *Williamson County* ruling that unequivocally requires an exhaustion of state remedies before an attempt to obtain a remedy in federal court."). The Petition recognizes that such remands occur (Pet. at 6), but refuses to acknowledge their significance. Instead of recognizing that such remands undermine his "double-standard" argument, Petitioner treats the remands as one more thing to complain about. (Pet. at 6 (asserting that takings plaintiffs "are at times subjected to a judicial 'ping-pong game' whereby they file suit in state court, only to have it removed to federal court, which then remands it back to state court")).

demonstrated this principle when it enforced the second prong of *Williamson* in a case that the defendant had removed to federal court, and ordered a remand to state court on that basis. *See Sandy Creek Investors Ltd. v. City of Jonestown, Texas,* 325 F.3d 623, 626 (5th Cir. 2003) (ordering a remand of a takings claim removed to federal court by a defendant because "Sandy Creek has not exhausted its administrative or state court remedies as required by the second prong of *Williamson.*")[14] Thus, *Williamson* creates no unequal access to federal courts, no unfairness, and no discrimination against plaintiffs. If, as in *International College of Surgeons*, the takings claim is joined with at least one other federal cause of action, and at least one of those claims is ripe, then the case may be filed in, or removed to, federal court. In that setting as well, plaintiffs' and defendants' access to federal courts is equivalent. Whether or not such a case reaches federal court directly or by removal, *Williamson* would require the dismissal of the unripe federal takings claim.[15]

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[14] It is unfortunate that the landowner in *Sandy Creek Investors* did not ask for a remand before the District Court. As the Court of Appeals for the Fifth Circuit recognized, the District Court would have been obligated to grant such a motion. *Id.*

[15] *See, e.g., McDonald's Corp. v. City of Norton Shores,* 102 F.Supp.2d 431, 436 (W.D. Mich. 2000) (dismissing unripe federal takings claim in removed suit, but reaching the merits of other federal claims).

B. Petitioner Repeatedly Misrepresents Portions of the Panel Decision Below.

The Petition represents that "*The Court of Appeals agreed* with the Petitioner that this situation represents 'an anomalous . . . gap in Supreme Court jurisprudence.'" (Pet. at i (ellipses in Petition, italics added); *see also* Pet. at 3 (the Eighth Circuit "*agreed* with Mr. Kottschade that the situation *was* 'anomalous'")) (emphasis added).)

Petitioner stripped the quoted words of their context. When that context is restored, the Eighth Circuit's supposed "agreement" with Petitioner's position disappears:

> The Supreme Court has not explicitly overruled or modified the ripeness requirements laid out in *Williamson* in the context of takings cases. The requirement that all state remedies be exhausted, and the barriers to federal jurisdiction presented by res judicata and collateral estoppel that may follow from this requirement, *may be anomalous.* Nonetheless *Williamson* controls the instant case. Compare this *perceived gap in Supreme Court jurisprudence* with this Court's observations in *Commonweath of Puerto Rico v. Branstad,* 787 F.2d 423 (8th Cir. 1986).

Kottschade, 319 F.3d at 1040-41 (emphasis added).[16]

C. The Petition Grossly Mischaracterizes the City's Actions.

At this stage, this case is not about what the City did. It is about what the Petitioner did not do – file a state takings suit first. Nevertheless, the Petition misrepresents what the City did and did not do. If Petitioner ever files the required state-court suit, the City will proudly defend its actions. Unfortunately, however, the Petition (and Rule 15.2) require the City to briefly address the subject here.

The Petition falsely represents that "Rochester imposed conditions that were grossly disproportionate," (Pet. at 1), and that the City "attached conditions to the permit that reduced the number of homes from 104 to 26, and added nearly $70,000 in development costs to each unit – in a market where such homes sell for $125,000," (Pet. at 3). The City's conditions (to general development plan approval, not a permit) would have no such effect. Indeed, each of the conditions reflected an application of pre-existing ordinances and regulations applicable to all development. The City's ordinance provisions were in place before Kottschade gained title to his property.

The Petition also falsely represents that the City "repeatedly refused Mr. Kottschade's requests to explain

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[16] In lifting adjectives and phrases from law review articles, the Petitioner often shows a similar disregard for context, meaning, or completeness. (See Pet. at 8, 10, 15, 17, 23-25). However, the page limits do not permit this Brief to explain and correct every such instance.

how the conditions related to his development," (Pet. at 1), and flatly refused, twice, in writing, to explain the nexus and its proportionality, (Pet. at 3). The record below conclusively proves otherwise. Not only did the City prepare a 13-page Technical Report explaining the nexus and proportionality of the conditions to the Petitioner's proposed development, the City repeatedly offered to meet with Petitioner to find other ways to accomplish the intended development. Unfortunately, Petitioner repeatedly rejected the City's invitation to discuss possible modifications to the development proposal short of the elimination of all nine conditions.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Dated: August 25, 2003

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No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER

Respondent.

On Petition for Writ of Certiorari to
The U.S. Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY

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INTRODUCTION

The City's Brief is an excellent illustration of a skilled lawyer doing his utmost to avoid, if not evade, the issues. The first Question Presented in the Petition shows this case turns on the fundamental fairness precept of 28 U.S.C. § 1441(a) that if a plaintiff could have filed suit in federal court, but chose to file in state court, the defendant may remove it. That statute is not even cited by the City.

That statute is critical. This Court held that a municipality sued for a regulatory taking of property has the right to remove that case from state to federal court (*City of Chicago v. International College of Surgeons*, 522 U.S. 156 [1997]), signifying — by the terms of 28 U.S.C. § 1441(a) — that the case could have initially been filed in federal court. The courts below refused to apply the teaching of *City of Chicago* and held that *Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) compels landowner/plaintiffs to sue only in state courts.

The Eighth Circuit termed this dissonance between the Court's jurisdictional decisions an "anomalous . . . gap in Supreme Court jurisprudence" (App., p. 5), but declined to describe how to bridge that gap, saying that was "for the Supreme Court to say, not us" (App., p. 5).

Courts and commentators (Pet., pp. 23-26) had chafed under *Williamson* even before this Court decided *City of Chicago*. Resolution of the jurisdictional conflict between *Williamson* and *City of Chicago* cannot come from lower courts. It must come from this Court, as the Eighth Circuit said. Certiorari is sorely needed.[1]

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1 The City bears unwitting witness to that need when it notes that lower courts continue to apply *Williamson* after *City of*

(continued on next page)

I
FACTUAL CORRECTIONS.

A few corrections need to be made to the City's factual recitation.[2]

First, the City is wrong when it asserts that "Kottschade's first and only attempt to obtain compensation for an alleged taking" was this lawsuit. (Opp., p. 1.) Mr. Kottschade first demanded that the City formally acquire the property and compensate him for the taking. The City did nothing. (Complaint, ¶ 24; AA 8.)[3]

Second, the City denies its conditions would reduce Mr. Kottschade's development from 104 homes to 26 and that the conditions would add nearly $70,000 in development costs to each home in a market where they sell for $125,000. (Opp., p. 24.) But those economic data are alleged in the complaint. (Complaint, ¶ 12; AA 5.) Besides, says the City, the ordinances requiring those conditions were in place before Mr. Kottschade purchased his land (Opp., p. 24), an argument defying this Court's holding in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

Finally, the City denies it violated *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1974) by refusing to explain the

(Opp., p. 4.) Until told to do otherwise, they will continue to do so.

2 To the extent the City indulges in charging Petitioner with "misrepresentation," a reference to U.S. Circuit Judge Thomas M. Reavley's article, *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 Pep. L. Rev. 637 (1990), is appropriate.

3 AA refers to the Appellant's Appendix below.

nexus and proportionality of its conditions to the burdens of Mr. Kottschade's project. (Opp., p. 25.) The complaint quotes the City's letter as saying that "The facts . . . make it impossible to give you a definitive cost at this time for your share . . . ." (Complaint, ¶ 17, R. 6.) That "impossibility," however, did not stop the City from imposing financially ruinous costs on Mr. Kottschade.

Because the City chose to proceed by motion to dismiss, the facts properly before the Court are the ones alleged in the complaint. If the City wishes to contest the facts, the place to do that is at trial.

II
THE RIPENESS JURISDICTIONAL MUDDLE *IS* A SERIOUS PROBLEM, AND HUNDREDS OF INFORMED PEOPLE HAVE RECOGNIZED THAT.

The City says that there is no problem because only "Petitioner, advocates for special interests, and one distinguished professor disagree with the reasoning and consequences of *Williamson* . . . ." (Opp., p. 2.)

Wrong. See Pet., pp. 23-26, for courts and commentators criticizing "the reasoning and consequences of *Williamson* . . . ." Recently, an amicus brief was filed by the Hon. Steve Chabot, Chair of the Subcommittee on the Constitution, Committee on the Judiciary of the U.S. House of Representatives, stressing the need for a resolution of the *Williamson/City of Chicago* trap to enable Congress to effectively do its job. (Chabot, pp. 3, 4, 6.)

Beyond that, hundreds of Members of Congress are on record agreeing with the position urged by Mr. Kottschade. In the 105th Congress, H.R. 1534 (to allow property owners to sue in federal court directly) passed the House by a vote of 248-178. Its Senate companion, S. 2271, garnered a majority (52 Senators), but not enough to

invoke cloture. As described by Congressman Chabot, the 106th Congress tried again. H.R. 2372 prevailed in the House by 226-182. Again, the problem was the Senate, where a threatened filibuster prevented the majority from acting. Thus a Congressional majority recognizes the anomalous nature of existing law and wants to rectify it.

III
THERE IS NOTHING IN THE CITY'S "CENTURY OF THIS COURT'S OTHER PRECEDENTS" HOLDING THAT SUITS LIKE THIS MUST BE FILED IN STATE, RATHER THAN FEDERAL, COURTS.

The City argues that *Williamson* merely continued precepts "articulated over a century ago." (Opp., p. 15) But each cited case stands only for the proposition that property owners have a right to sue for a taking of their property. However, ***all of those cases were filed in federal court***, and ***not one of those cases says that such suits must be filed in state courts***. Indeed, they couldn't have been filed in state court. (See cases at Pet., p. 11, fn. 5, in which landowners sued local government agencies for just compensation in federal courts before *Williamson* forbade it.)

Williamson has been around for 18 years, not more than a century, as the City suggests. Harmonizing it with *City of Chicago* will neither revolutionize the law nor require reconsideration of any of those century-old cases.

IV
IF IT IS TO BE VIEWED RATIONALLY, *CITY OF CHICAGO* MUST IMPACT *WILLIAMSON*, AND THEREFORE IT NEEDS TO BE DEALT WITH.

The City's insistence that the issue here is simple (e.g., Opp., p. 1) does the Court a disservice. Everyone but the City agrees that regulatory taking ripeness law is confusing. (See Pet., pp. 23-26.) *City of Chicago* increased the difficulty and needs to be grappled with.

First. *City of Chicago* gives cities the right to remove regulatory taking cases to federal court under 28 U.S.C. § 1441(a). That is its core holding. It is no "misrepresent[ation]" (Opp., p. 20) to say so. Perhaps the City also thinks Justice Ginsburg "misrepresent[ed]" the upshot of an opinion she saw as both a "watershed" (522 U.S. at 175) and a "landmark" (522 U.S. at 180) because:

> "[a]fter today, litigants asserting federal-question or diversity jurisdiction may routinely lodge in federal courts direct appeals from the actions of all manner of local (county and municipal) agencies, boards, and commissions." (*City of Chicago*, 522 U.S. at 175; Ginsburg, J., dissenting.)

Second. Ripeness is jurisdictional. (*Forseth v. Village of Sussex*, 199 F.3d 363, 368 [7th Cir. 2000].) A court either has it or not. If, after *City of Chicago*, U.S. District Courts have jurisdiction over regulatory taking cases when removed by defendants then, under 28 U.S.C. § 1441(a), plaintiffs must be able to sue there first.[4]

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[4] The City drags a red herring through its brief by saying that only "ripe" cases may be removed. (Opp., pp. 3, 7, 21.) First, as the Eighth Circuit noted, Mr. Kottschade had exhausted his administrative remedies (App., p. 5), thereby satisfying the

(continued on next page)

Third. The City says it was other claims pled by the Surgeons (due process and equal protection) that provided jurisdiction, which "was present . . . **in spite of**, not because of, the plaintiff's inclusion of a federal takings claim." (Opp., p. 21; emphasis in original.)

Wrong. Ripeness is based on the complaint, and the Surgeons' complaint alleged a taking. (*City of Chicago*, 522 U.S. at 160.) Besides, *Williamson's* ripeness rules have been applied to due process and equal protection claims. (Pet., p. 8, fn. 4.) If the taking claim wasn't ripe, the same held true for the other federal claims, and it is no "misrepresent[ation]" (Opp., p. 20) to say so.

Fourth. That courts have applied or referred to the second prong of *Williamson* since *City of Chicago* (Opp., pp. 4-5, 9, 18) is not decisive, as the latter's impact was neither raised nor discussed. With respect to this Court, *Williamson* was not involved in *Brown v. Legal Foundation of Washington*, 123 S.Ct. 1406 (2003), but mentioned as part of the legal background. It was also in the background of *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999) because California's refusal to recognize a compensatory remedy for regulatory takings excused compliance with *Williamson*. Any other comment was merely historical dictum. The relationship between *Williamson* and *City of Chicago* has been squarely raised and briefed here — but not in the City's cited cases.

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first ripeness prong. Second, the only "unripe" thing was not suing in state court. But the Eighth Circuit also noted that Mr. Kottschade was "justly" concerned he would be precluded from suing in federal court (App., p. 6), as so many had been before (see Pet., pp. 17-18). That's what this Petition is all about. Besides, this case is as ripe as *City of Chicago*.

In sum, *City of Chicago* has multiplied the confusion already present in regulatory takings. It cannot be that it had no impact whatever on *Williamson*.

V
NOW IS AN APPROPRIATE TIME TO REVIEW THE WORKINGS OF A COURT CREATED RULE THAT ISN'T WORKING.

The City says there is no reason to review the workings of *Williamson* — alone or with *City of Chicago*. (Opp., p. 11 et seq.) "Williamson's second prong has not 'proven to be intolerable simply in defying practical workability.' [Citation.]" (Opp., p. 12.) Nor have there been legal or constitutional developments to prompt reexamination. (Opp., p. 11.)[5] Leave *Williamson* alone, says the City, and don't worry about *City of Chicago*.

"Bogus defenders of *stare decisis*" — that's what California's late Chief Justice Roger Traynor would have called the City's counsel. In his words:

> "At the slightest sign that judge-made law may move forward these bogus defenders of *stare decisis* conjure up mythical dangers to alarm the citizenry. They do sly injury to the law when the public takes them seriously and timid judges retreat from painstaking analysis within their already great constraints to safe and unsound repetitions of magic words from the legal lore of the year before much too long ago." (Roger Traynor, *No Magic Words Could Do It Justice*, 49 Calif. L. Rev. 615, 621

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5 Perhaps the majority of both Houses of Congress thinking this problem is in need of a solution might be such a "development."

[1961].)

There are serious problems with *Williamson*, either alone or with *City of Chicago*. For the City to say that, in practice, this has not "proven to be intolerable simply in defying practical workability" shows the parochial view of a litigant that gains everything and loses nothing in the *status quo*. The point of every court and scholar quoted at Pet., pp. 23-26 is that this test is met — in spades.

And if a change in the constitutional framework is the key (Opp., p. 11), then *City of Monterey*'s holding (14 years after *Williamson*) of a 7th Amendment right to a federal court jury trial surely qualifies.[6]

One doesn't cast away precedents lightly. However, history shows that when the scholarly community has been critical of its decisions,[7] when application of a precedent has produced a rule which "stands only as a trap for the unwary,"[8] when necessary to clarify the implications of earlier decisions in light of more recent history,[9] when

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6 The City's brief does not accurately reflect Minnesota practice when it asserts that a jury trial would be available there. (Opp., p. 19.) Although Minnesota law permits a jury to make certain fact determinations, the ultimate decision on liability is made by the trial judge. Where the *City of Monterey* jury decided liability as a question of *fact*, that issue is held in Minnesota to be an issue of *law* for the judge. (*Thomsen v. State*, 170 N.W.2d 575, 580-581 [Minn. 1969].) Minnesota thus does *not* provide as much protection as the 7th Amendment.

7 *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 48 (1977).

8 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

9 *S.E.C. v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967).

decisions of this Court are "if not directly" conflicting, "are so in principle,"[10] or when "the answer suggested by our prior opinions is not free of ambiguity,"[11] this Court has reviewed its prior decisions. "In our view, the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance." (*Continental*, 433 U.S. at 48-49.)

All of those factors were described in the Petition and ignored by the City. Certiorari is amply warranted.

CONCLUSION

This is a 42 U.S.C. §1983 case, although you couldn't tell it from the City's brief. In examining its plain words this Court has been clear: the statute provides a ***federal*** remedy in ***federal*** court to protect citizens against unconstitutional local government actions impairing their ***federal*** rights. (E.g., *Mitchum v. Foster*, 407 U.S. 225, 239 [1972]; *Burnett v. Grattan*, 468 U.S. 42, 50, 55 [1984]; *Felder v. Casey*, 487 U.S. 131, 141 [1988]; cases cited at Pet., pp. 27-28.) To accomplish that, Congress intended to "throw open the doors of the United States courts" to those deprived of constitutional rights "and to provide these individuals ***immediate access to the federal courts*** . . . ." (*Patsy v. Florida Board of Regents*, 457 U.S. 496, 504 [1982]; emphasis added.)

Forcing property owners to sue in state courts to protect their federal constitutional rights does not comport with 42 U.S.C. § 1983. Nor does it comport with the 7th Amendment, which guarantees a jury trial in federal court

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10 *Funk v. United States*, 290 U.S. 371, 374 (1933).

11 *McDaniel v. Sanchez*, 452 U.S. 130, 136 (1981).

but not in state courts.

All this is exacerbated and magnified by the impact of *City of Chicago*. There is no justification for making a plaintiff's right to a federal forum depend on the whim of the defendant in deciding whether to remove a case. It is a matter of both jurisdiction and fairness. Either they exist or they don't. But the rule must be the same for both sides.

Mr. Kottschade prays that certiorari be granted to address the important issues raised here.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND SAN REMO HOTEL IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does this Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), prevent a property owner from raising a takings claim under the federal Constitution in federal court, as an initial matter, when the defendant may directly remove such a claim from state court to federal court?

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation and San Remo Hotel respectfully submit this brief amicus curiae in support of Petitioner, Franklin P. Kottschade.[1]

San Remo Hotel is a privately owned hotel located in San Francisco, California. For more than a decade, San Remo has tried to get a federal court to rule on its claim that it suffered a taking under the federal Constitution when the City of San Francisco demanded a payment of $567,000 as a condition of a land use permit. San Remo has attempted to invoke original jurisdiction; it has tried to secure jurisdiction after unsuccessfully pursuing just compensation in state courts; it has even attempted to reserve its federal claims for federal review under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), while permitting the state courts to resolve its state law takings claims. So far, nothing has worked.

As of this writing, San Remo continues to plead, once again to the Ninth Circuit, for a chance to have its significant federal constitutional claims heard on the merits. Based on its experience, San Remo believes that the lower courts are in desperate need of guidance on the scope and applicability of *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). It urges this Court to use the present case to give that guidance.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind

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[1] Pursuant to this Court's Rule 37.2, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

in America. For 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property. PLF attorneys have been before this Court on three occasions representing individuals whose right to use their property was unlawfully denied by government agencies. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF has also participated as amicus curiae in nearly every major real property takings case heard by this Court in the last two decades, including the recent case of *Tahoe Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 533 U.S. 948 (2001).

PLF believes that its litigation experience will provide an additional valuable viewpoint on the issues presented in this case. Amici PLF and San Remo Hotel seek to focus this Court's attention on the federal jurisdictional black hole into which *Williamson County* draws a takings claimant and the inexplicable removal exception provided only to government defendants.

INTRODUCTION

This case squarely presents a disturbing dichotomy in federal jurisdiction over claims arising under the Takings Clause. Since this Court's decision in *Williamson County*, American property owners like Mr. Kottschade have been told that they cannot bring a takings claim in federal court until they have sought just compensation from the state because the federal claim will not ripen until the state denies compensation. Yet, when plaintiffs follow these directions, they are often told that they cannot get into federal court at all because the prior state proceedings preclude further litigation in the federal forum. On the other hand, federal courts have thrown open their doors to a *government defendant* that seeks to remove to federal court a takings claim that is initially filed in state court

and which should be unripe, under the reasoning applied to plaintiffs.

In *City of Chicago v. College of Surgeons*, 522 U.S. 156 (1997), this Court seemed to sanction such permissive removal of takings claims without explaining how such a doctrine can be logically or equitably reconciled with the ripeness barriers imposed on plaintiffs. The resulting tension between the barriers imposed on plaintiffs and the open-door policy for defendants has produced absurd and unfair results. This case provides the Court with an opportunity to address the festering jurisdictional dichotomy created by *Williamson County* and *College of Surgeons* and to bring consistency and justice to this area of the law.

ARGUMENT

I

WILLIAMSON COUNTY HAS STRANDED ONE CLASS OF CONSTITUTIONAL PLAINTIFFS—PROPERTY OWNERS—IN THE STATE COURTS

Property owners who have followed *Williamson County*'s apparent instruction to (unsuccessfully) seek compensation from the state before filing a takings action in federal court have been subjected to a cruel trick: the very act of engaging in the state litigation required by *Williamson County* has often served to end, rather than mature, their chance for federal review.

When the owner fails to obtain compensation from the state, many federal courts have applied *claim* preclusion to deny subsequent jurisdiction of the "ripened" takings claim. *See, e.g., Wilkinson v. Pitkin County Board of County Commissioners*, 142 F.3d 1319, 1324-25 (10th Cir. 1998). Recognizing the tension between this result and *Williamson County*, other courts have suggested an escape: a takings claimant can reserve federal claims for later federal adjudication, under this Court's decision in *England* or

otherwise, at the time of the state court litigation. *See, e.g., Dodd v. Hood River County* (*Dodd I*), 59 F.3d 852, 862-63 (9th Cir. 1995). Yet, when the property owner pursues this new promise, courts have dropped the other shoe: a proper reservation does not necessarily prevent dismissal of the supposedly-ripened and reserved federal claims on grounds of *issue* preclusion. *See, e.g, Dodd v. Hood River County* (*Dodd II*), 136 F.3d 1219, 1223-24 (9th Cir. 1998).

Even the most careful litigant may discover that *Williamson County* absolutely forecloses federal jurisdiction in practice, if not in theory. The experiences of San Remo Hotel illustrate how far some federal courts will go in applying *Williamson County* to bar takings claims.

In the early 1990's, the City of San Francisco demanded a $567,000 fee, pursuant to a local ordinance, in return for a permit that would allow San Remo to convert some residential hotel rooms to tourist use. *See San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 95 (Cal. 2002). Since then, San Remo has been subjected to a maze of jurisdictional dead-ends in a (so-far) vain attempt to get a federal court to resolve its claim that this exaction amounted to a taking in violation of the Fifth Amendment to the United States Constitution.

The hotel initially filed a complaint in federal district court, alleging that the conversion fee ordinance violated the United States Constitution on its face and as applied to the hotel. *See San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1100 (9th Cir. 1998). All of the takings claims except for one facial claim were dismissed for lack of jurisdiction because the hotel had not yet attempted to secure just compensation through state court procedures, in accordance with *Williamson County*. *Id.* at 1101-03. To the extent that the hotel's facial taking claim rested on the theory that the challenged conversion ordinance did not "substantially

advance legitimate state interests," the court invoked *Pullman* abstention, thus withholding jurisdiction pending litigation of San Remo's other claims in state court. *Id.* at 1102.

San Remo then dutifully attempted to ripen its federal takings claims by seeking compensation under California state law. *See San Remo Hotel v. City and County of San Francisco*, 41 P.3d at 91. In so doing, San Remo explicitly reserved its federal takings claims under *England*, for later federal review. When the California Supreme Court denied San Remo's claim for compensation in 2002, the court recognized the reservation and carefully stressed that its decision arose from interpretation of the takings provision in the California Constitution, not the parallel clause of the Fifth Amendment. *See San Remo*, 41 P.3d at 90 n.1; *id.* at 118 (Baxter, J., concurring in part and dissenting in part) ("Plaintiffs have reserved their federal claims").

After the adverse state decision, San Remo returned to federal court to reassert its properly reserved federal takings claims. The hotel's meticulous adherence to *Williamson County* and *England* was not sufficient, however, to convince the Federal District Court for the Northern District of California to exercise its jurisdiction over San Remo's federal claims. Relying on the doctrine of issue preclusion, the court held that the state court litigation engaged in pursuant to *Williamson County* prevented the District Court from hearing San Remo's Fifth Amendment claims, the proper *England* reservation notwithstanding. Incredibly, the court applied issue preclusion because it believed the California Supreme Court had resolved San Remo's state case under federal law, even though the state court's opinion expressly stated that "*no federal question* has been presented or decided in this case." *San Remo*, 41 P.3d at 91 n.1 (emphasis added).

The same type of *Williamson County*-inspired jurisdictional confusion seen in San Remo's case has infected

equal protection and substantive due process, as well as takings claims arising in a land use context. *See, e.g., Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996) (requiring plaintiff to pursue a compensation claim in state court before raising a substantive due process or equal protection claim in federal court). The prevailing message is that federal courts will require property owners to rely solely on the state courts to protect them from constitutional violations by local and state government entities.

II

COLLEGE OF SURGEONS APPEARS TO AFFIRM AN IRRATIONAL AND UNFAIR EXCEPTION TO *WILLIAMSON COUNTY* FOR GOVERNMENT DEFENDANTS

Property owners do have one slim hope for obtaining federal jurisdiction, a hope that depends on the whim of their opponents. If the government decides to remove a constitutional claim to federal court for its own purposes, the plaintiff may have a rare opportunity to present a takings, or other constitutional claim to the court. This is because the federal judiciary, including this Court, generally have allowed defendants to remove takings claims free from *Williamson County*'s restrictions. *See College of Surgeons*, 522 U.S. at 164.

No one has yet explained how such permissive removal can exist in the post-*Williamson County* takings world. Removal of a claim by defendants is only proper, after all, if the court would have had jurisdiction over the complaint. *See College of Surgeons*, 522 U.S. at 163 ("The propriety of removal thus depends on whether the case originally could have been filed in federal court."). But the courts have repeatedly said that they *do not* have jurisdiction over a takings complaint, when filed by a plaintiff in the first instance, because of *Williamson County*. There is no intelligible basis for a

complete reversal of policy when it is the defendant that presents the complaint by removal.

Not surprisingly, the unresolved tension between the lack of any apparent *Williamson County* limitation on removal and the severe restrictions imposed on plaintiffs sometimes explodes. The resulting impact almost always falls on the property owners. In *Sandy Creek Investors, Ltd. v. City of Jonestown*, 325 F.3d 623 (5th Cir. 2003), for instance, a federal district court allowed the government to remove state and federal takings claims. *Id.* at 625. The parties then filed competing motions for summary judgment and the court ruled in favor of the landowner. *Id.* at 625-26. But on appeal, the circuit court relied on *Williamson County* and held that the landowner's claims were not ripe because the owner did not seek compensation in state court. *Id.* at 626. The owner was therefore sent all the way back to the state court where it started and where it would have remained if not for the government's apparent right to remove a federal takings claim. *Id.*

A similar debacle occurred in *Seiler v. Charter Township of Northville*, 53 F. Supp. 2d 957 (E.D. Mich. 1999). There, a landowner filed a takings action in state court, only to have it removed to federal court, without difficulty, by the government defendant. *Id.* at 960. But, unlike in *Sandy Creek*, the government actually had the audacity then to argue that the takings claims were unripe because the plaintiff had not yet fulfilled *Williamson County*'s command to first seek compensation in state court. *Id.* at 962. Even more incredibly, the federal court agreed, thus permitting the government to drag the plaintiff into a federal forum, which was supposedly initially (if not always) unavailable to the plaintiff, only so that it could have the plaintiff kicked back to the state forum (where the plaintiff dutifully started in accordance with *Williamson County*), thereby forcing the plaintiff to expend precious resources litigating in a forum it never sought. *Id.*

Permitting the free removal of takings claims, without addressing *Williamson County*, allows government defendants to whipsaw plaintiffs with the conflicting decisions of this Court and, ultimately, to defeat their constitutional claims by jurisdictional attrition. The lynchpin of this sad situation is the decision in *Williamson County*, not *College of Surgeons* or the removal rule generally. By appearing to require takings plaintiffs to litigate first in state court, without discussing what happens after this occurs, *Williamson County* created a vacuum with respect to how its unique rule is to interact with the pre-existing web of jurisdictional doctrine. The federal courts have naturally attempted to fill this vacuum. In so doing, they have established an unjust, contradictory, and inconsistent jurisdictional framework, one that tells plaintiff property owners that they should expect no protection for their federal constitutional rights from the federal courts, except (maybe) when the defendant believes federal jurisdiction is advantageous to its own case. This scheme is incompatible with "[t]he concepts of 'fairness and justice' that underlie the Takings Clause," *Palazzolo v. Rhode Island*, 533 U.S. at 633 (O'Connor, J., concurring), and should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals.

DATED: July, 2003.

Respectfully submitted,

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BRIEF AMICI CURIAE OF
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INTERESTS OF THE AMICI CURIAE[1]

The parties have filed written consent with the Clerk of the Court allowing the amici listed herein to submit this brief in support of the Petitioner.

The *amici* are a coalition of trade associations whose membership shares a common interest in the protection of private property rights safeguarded by the Takings Claus of the Fifth Amendment. Accordingly, the *amici* are concerned with any judicial decision that calls into question the "just compensation" remedy available under the U.S. Constitution to its members. In this case, their interest is heightened by the basic, fundamental, jurisdictional issue at play: When their members suffer an uncompensated taking as a result of government actions, can they ever vindicate those types of federal constitutional claims in a federal court?

The American Forest & Paper Association (AF&PA) is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. It represents approximately 125 member companies which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. The AF&PA is also the umbrella for more than 60 affiliate member associations that reach out to more than 10,000 companies.

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[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned Counsel of Record certifies that he authored this Brief in its entirety; that it was not written in whole or in part by counsel for a party; and that no one, other than the amici curiae, has made a monetary contribution to its preparation or submission.

AF&PA represents an industry that owns the majority of commercial timberland in the United States, amounting to over 50 million acres. Activity on this land is often subject to government regulation.

The Building Industry Legal Defense Foundation ("BILD") is a non-profit corporation, organized and existing under the laws of the state of California. BILD represents and advocates on behalf of more than 1700 BIA/SC member companies ("Members") in eight chapters in Southern California, including landowners, developers, home builders, building industry subcontractors, utility providers, and business entities of all kinds. Members own land subject to regulatory bodies with jurisdiction throughout the region. The BILD Foundation's mission is to defend the legal rights of home and property owners. BILD seeks to participate in regulatory, judicial and other venues wherever critical legal and policy matters affecting its members are at issue.

The California Building Industry Association ("CBIA") is a non-profit mutual benefit trade association organized under the laws of the State of California. CBIA represents over 6,000 member companies who employ more than 500,000 people in the State of California. CBIA's members are responsible for the construction of more than 70% of all new homes built in the State of California annually. Its members are involved in all aspects of the planning and building and construction industry, including working with local authorities in the planning stages. Its mission includes maintaining a stable right to private property.

The missions of the International Council of Shopping Centers ("ICSC") are to advance the shopping center industry and to promote its role in the commercial

distribution of consumer goods and services. Its members have a strong interest in protecting private property rights and in advocating the interests of the shopping center industry before federal, state, and local governmental bodies, as well as in the courts.

The National Association of Industrial and Office Properties ("NAIOP") is the nation's leading organization of developers, investors, and owners of commercial real estate. NAIOP provides support and guidance to its over 11,000 members nationally to create, protect, and enhance the value of commercial and industrial real estate, as well as promote grassroots public policy related to real estate development.

The National Association of Realtors ("NAR") is a non-profit association representing persons engaged nationwide in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. Its members contribute to such activities as promotion of equal opportunity in housing, real estate licensing, neighborhood revitalization, safeguarding real property rights, public service, and cultural diversity.

The Real Estate Roundtable ("RER") is the organization that brings together leaders of the nation's top public and privately-held real estate ownership, development, lending and management firms with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy. Collectively, RER members hold portfolios containing over 3.5 billion square feet of developed property valued at more than $300 billion. The RER has

long advocated that the implementation of local, state and federal laws be more sensitive to the constitutional property rights of private citizens, and that adequate remedies be available when those rights are violated.

The Rochester (Minnesota) Area Builders ("RAB") is a professional organization established in 1953 consisting of businesses involved in the construction industry. As the leader in the greater Rochester area construction industry, its goal is to benefit its members in the professional growth of their businesses and to support their legal rights through participation, advocacy, education, and community involvement. RAB also serves as a resource for its community by providing education about quality building practices.

SUMMARY OF ARGUMENT

This case is about court access and procedural fairness. The Court is not asked to decide whether Frank Kottschade must be compensated for the taking that is alleged, but simply whether that issue is ripe for resolution in federal court.

The Court of Appeals, relying upon *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985), affirmed the District Court's dismissal of Mr. Kottschade's takings claim on the ground that it was not ripe for decision in a federal court until he had "unsuccessfully attempted to obtain just compensation through the procedures provided by the state for obtaining such compensation." *Kottschade v. City of*

Rochester, 319 F.3d 1038, at 1040 (8th Cir. 2003).[2] In so doing, it declined to address the conflict between *Williamson* and the Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). The nature of that conflict is aptly stated in the Petition (Questions Presented, Question 1). On the one hand, under *Williamson* as interpreted by the Court of Appeals and other federal courts, landowners seeking compensation for regulatory takings must first sue in state court, but if they do and are not successful, their attempts to return to a federal court to validate their federal claims are frustrated by doctrines of issue and claim preclusion. On the other hand, *City of Chicago* affords municipal defendants in regulatory takings cases the discretion and absolute right to remove them to federal court, even though such a right is limited only to cases where the plaintiff could have filed suit in federal court in the first place (28 U.S.C. § 1441(a)).

Of course, as the lower courts have ruled herein, landowners such as Mr. Kottschade are not permitted to sue in federal court. Further, as stated in Question 1 of the

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[2] In an unpublished Opinion found in the Appendix to the Petition at page App. 9, The District Court described the "threshold issue" as whether Plaintiff "must first seek compensation through state procedures," and ruled that in a regulatory takings case "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post-deprivation remedy for the property loss'." *Id.* at App. 11, (D.Minn. 2002), citing *Williamson*, 473 U.S. at 195. The District Court concluded that until Kottschade seeks relief "in a *state court* inverse condemnation action" and relief is thereafter denied, the claim of taking without just compensation is not ripe for a decision by a federal court and, accordingly, it lacked jurisdiction herein. *Id.* at App. 17 (emphasis added).

Petition, the combination of *Williamson* and *City of Chicago* gives municipal defendants "a veto power" over a landowner's 7th Amendment right to a jury trial. *See, City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). The Court of Appeals, reflecting the concerns of other federal appellate courts, acknowledges that Mr. Kottschade's arguments are "justly" stated; that the combination of the state remedies exhaustion requirement and the barriers to federal jurisdiction thereafter facing compliant landowners "may be anomalous;" but concludes that whether and how the problem should be addressed, "is for the Supreme Court to say, not us." *Kottschade*, at 1041. With respect, the Court should accept this invitation.

Nothing in *Williamson* warrants the conclusion that *only state courts* can be utilized as the forum for determining whether an adequate post-deprivation remedy for a property loss exists under state law. Federal courts routinely become involved in reviewing actions of local governments in other constitutional contexts, and the treatment of Fifth Amendment takings claims should be no different. When local land use decisions are challenged on takings grounds, no basis exists to exclude federal courts from determining whether compensation has been paid, or examining whether "state procedures" for obtaining compensation from local governments are adequate or have been exhausted.

In light of *City of Chicago*, takings plaintiffs must be able to pursue their claims in federal court without first pursuing state court litigation. *Williamson*'s ripeness requirement cannot be reconciled with the laws of issue and claim preclusion. Thus, it is imperative that certiorari be granted.

Zoning bodies and lower courts across the country have abused or misapplied the Supreme Court's decision in

Williamson by fabricating additional obstacles before a court can assess the merits of a takings claim – causing concrete deprivations of property rights. As a result, recent research (discussed *post* at page 16) shows that over 80% of takings claims have been denied or dismissed by U.S. District Courts on ripeness or abstention grounds. Nearly two-thirds of those cases which were appealed to federal appellate courts were dismissed on jurisdictional grounds. Clearly, the Court could not have intended that the doors of the federal courthouse are slammed shut only on plaintiffs alleging a taking under the Fifth Amendment, while (1) municipal defendants in such cases retain the option of litigating in either federal or state court, *City of Chicago*, and (2) plaintiffs with other constitutional claims are allowed reasonable access to the federal courts.

ARGUMENT

I. FEDERAL COURTS SHOULD REVIEW TAKINGS CLAIMS ARISING FROM LOCAL LAND USE MATTERS JUST AS THEY ROUTINELY REVIEW CONSTITUTIONAL CHALLENGES INVOLVING OTHER ACTIONS OF LOCAL GOVERNMENTS.

The "right of access to the courts" has been described by this Court as a "fundamental right guaranteed by the Constitution." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974). Surely, this cannot mean that for citizens asserting Fifth Amendment takings claims, this fundamental right extends only to review by state courts. Yet that is exactly what has happened in the wake of *Williamson* and its progeny in lower federal courts. Federal judges routinely cite *Williamson's* ripeness requirements in rejecting takings claims. This is due primarily to the fact that they interpret *Williamson's* second prong – requiring

utilization of "state procedures" to obtain just compensation – as requiring landowners to litigate their takings claims in state courts first. Nothing in *Williamson* warrants such an interpretation.

Federal judges should review constitutional challenges to local government actions in the land use area, just as they review local government infringements upon other privileges in the Bill of Rights. The exercise of constitutional rights often hinges on traditionally local issues. Yet, these highly insular concerns present no barriers to federal court jurisdiction, except in the Fifth Amendment context.

On October 14, 1997, Professor Daniel R. Mandelker of Washington University of St. Louis, one of the leading academics in the country on land use regulation (and an advocate of the strong use of regulatory power), wrote a letter to the Chairman of the Judiciary Committee of the U.S. Senate, regarding this very problem.[3] He cited numerous examples of the extensive involvement of federal courts in state and local constitutional issues, contrasting them to the peremptory treatment often given to takings claims. Beginning with cases involving encroachments by local governments upon constitutional guarantees of freedom of speech and religion, including decisions of the Court, he noted that nothing in the First Amendment arena

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[3] *See* letter from Professor Mandelker to Senator Orin G. Hatch, Chairman of the Senate Judiciary Committee, dated October 14, 1997, on file with Counsel for the *Amici*. Professor Mandelker also testified before committees of the House and Senate on these issues (hereinafter "Mandelker Testimony"). The Mandelker Testimony has been reprinted in 31 THE URB. LAW. 234 (Spring 1999).

requires a plaintiff to first litigate such "provincial matters" in state court "before the doors of the federal courthouse are unlocked."[4] Of course, federal court involvement in state and local constitutional issues is by no means limited to First Amendment cases. In emphasizing this point, Professor Mandelker stated in part:

> "In the land use venue, federal judges have shown no hesitation to embroil themselves in household issues such as "family values." For example, in a celebrated zoning case the Supreme Court stated that "[a] quiet place where yards are wide, people are few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs....It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terrev. Boraas*, 416 U.S. 1, 9 (1974) . In *Belle Terre*, the Second Circuit "start[ed] by examin[ing]" the subject zoning ordinance's validity with reference to "the interest of the local community in the protection and maintenance of the prevailing traditional family pattern...." 476 F.2d 806, 815 (2d Cir. 1973) (emphasis supplied). The federal courts also considered the constitutionality of zoning as applied to non-traditional families in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (invalidating Texas city's denial of special use permit for the operation of a group home for the mentally retarded). In these cases, highly parochial matters

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[4] October 14, 1997 letter from Professor Mandelker to Senator Orin G. Hatch, Chairman, Senate Judiciary Committee.

were resolved on the merits by federal courts because important constitutional rights were at stake. The same result should obtain in the Fifth Amendment context. Citizens should not be frozen out of federal court when municipalities infringe upon constitutionally-protected property rights."

"Like land use, education is traditionally considered an area of local and state concern. Yet the federal courts have a long history of assessing the constitutionality of state or local statutes or policies dealing with education. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama law requiring period of silence in public schools "for meditation or voluntary prayer"); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (school district's program providing public instructional services for religious education to non-public school students) (overruled on other grounds, *Agostini v. Felton*, 521 U.S. 203 (1997); *Abington School Dist. v. Schemp*, 374 U.S. 203 (1963) (Pennsylvania statute providing for Bible reading in public school). The point is that initial state court consideration of state education statutes is not a prerequisite to federal court jurisdiction. Applications of municipal land use laws in a manner that raises Fifth Amendment issues should not be treated any differently."

"Similarly, the federal courts have not hesitated to address property issues to determine the Fourth Amendment's scope. For example, "the curtilage concept [that] originated at common law to extend to the area immediately surrounding a dwelling house ... plays a part in determining the reach of the Fourth Amendment"—and is freely decided by federal

> courts in the first instance. *United States v. Dunn*, 480 U.S. 294, 300 (1987) (barn located 60 yards from home, not enclosed by a fence, was not within curtilage and thus not protected by Fourth Amendment). Indeed, federal judges have preoccupied themselves with whether garbage, sitting at the curb outside one's home and to be picked up by local trash collectors, warrants Fourth Amendment protection.[5] In none of these cases was state court litigation over the breadth of the Fourth Amendment a necessary precondition to federal adjudication on the merits. These cases bring to mind Justice Brennan's recognition that "if a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n. 26 (1981) (Brennan J., dissenting)."[6]

In light of the long involvement of federal courts in constitutional issues arising across a wide spectrum of purely local matters, no valid basis exists for discriminating against citizens whose property rights under the Fifth Amendment may have been violated by local land use actions. If these citizens may only access state courts to

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[5] *See, e.g., United States v. Dela Espriella,* 781 F.2d 1432 (9th Cir. 1986); *United States v. O'Bryant,* 775 F.2d 1528 (11th Cir. 1985); *United States v. Michaels,* 726 F.2d 1307 (8th Cir.), *cert. denied,* 469 U.S. 820 (1984); *United States v. Kramer,* 711 F.2d 789 (7th Cir.), *cert. denied,* 464 U.S. 962 (1983); *United States v. Terry,* 702 F.2d 299 (2d Cir. 1983), *cert. denied sub nom. Williams v. United States,* 461 U.S. 931 (1983); *United States v. Crowell,* 586 F.2d 1020 (4th Cir. 1978, *cert. denied,* 440 U.S. 959 (1979); *Magda v. Benson,* 536 F.2d 111 (6th Cir. 1976); *United States v. Mustone,* 469 F.2d 970 (1st Cir. 1972).

[6] October 14, 1997, letter from Professor Mandelker to Senator Orin G. Hatch, Chairman, Senate Judiciary Committee.

validate their claims, the Takings Clause has indeed become a "poor relation" to other protections afforded in the Bill of Rights.[7] Professor Mandelker correctly concluded that the "state exhaustion requirement" should be removed "from the ripeness landscape," because requiring a plaintiff to seek compensation in State court:

> "effectively drain[s] the ripeness rules of any meaning. They prevent federal courts from ever reaching the final decision issue because, under this view, a takings plaintiff must seek compensation in state court until that court clearly says it will not entertain a compensation remedy.[8]

II. IN LIGHT OF THIS COURT'S DECISION IN *CITY OF CHICAGO V. INTERNATIONAL COLLEGE OF SURGEONS*, TAKINGS PLAINTIFFS MUST BE ABLE TO PURSUE THEIR CLAIMS IN FEDERAL COURT WITHOUT FIRST PURSUING STATE COURT LITIGATION.

The interplay of *Williamson* and *City of Chicago,* as interpreted by the lower courts herein and other federal courts,[9] has elevated *Williamson* to a weapon of mass obstruction against takings claimaints. The amici support the Petitioner's argument that a ludicrous situation now exists, a "Catch 22" where, as a practical matter, a plaintiff

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[7] *See Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994).

[8] Mandelker Testimony, 31 THE URB. LAW. 234, at 251 (Spring, 1999).

[9] *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) *cert denied*, 525 U.S. 923 (1998); *Wilkinson v. Pitkin County Bd. of Comm'rs*, 142 F.3d 1319 (10th Cir. 1998).

in a takings case may proceed only in state court, while the local government retains the option of defending in either state or federal court. As the *Wilkinson* court noted in applying preclusion doctrines to bar a takings claim,

> *Williamson's* ripeness requirement may, in actuality, almost always result in preclusion of federal claims . . . . It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of [issue and claim preclusion].[10]

Indeed, this was a problem that Professor Mandelker envisioned in 1997:

> [E]ven if the property owner strictly adheres to *Williamson County*, her failure to raise a *federal* constitutional claim in *state* court could destroy her chances of ever having a federal judge address the Fifth Amendment claim. I do not think that property owners should be forced to litigate federal takings claims in State court, yet this is the ironic effect of the synergy between ripeness and res judicata.[11]

Unfortunately, that is precisely what has occurred in cases since Professor Mandelker submitted his testimony. Mr. Kottschade filed his valid takings claims in federal court precisely because if he is forced to litigate them in state court, he will never reach the U.S. District Court on the merits of his case. The federal judge would simply invoke claim or issue preclusion and thus bar federal adjudication. The Court of Appeals below, echoing the concerns of the *Wilkinson* court, acknowledges this "anomalous" reality,

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[10] *Wilkinson*, 142 F.2d at 1325, n.4.
[11] Mandelker Testimony, 31 THE URB. LAW. 234, at 251.

but expressly leaves it to this Court to resolve it.[12] The amici respectfully request the Court to do so.

III. ZONING BODIES AND LOWER FEDERAL COURTS ACROSS THE COUNTRY HAVE ABUSED WILLIAMSON TO FABRICATE ADDITIONAL HURDLES BEFORE A FEDERAL COURT CAN ASSESS THE MERITS OF A TAKINGS CLAIM.

Although not directly germane to the issue raised by this appeal, the hostility of federal courts to landowners' takings claims deserves comment. [13] This hostility has conveyed a message that local land use decisions are immune from constitutional review.[14] It has encouraged agencies to

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[12] *Kottschade v. City of Rochester*, 319 F.3d at 1041.

[13] Since *Williamson*, this hostility has become more pervasive, and indeed has bordered on elitist at times. For example, even though constitutional property rights issues were at stake, one appellate court proclaimed that "federal courts are not boards of zoning appeals." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994). Another, in dismissing a takings claim, was concerned that it be perceived as "the Grand Mufti of local zoning boards." *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989). Yet another characterized the takings claim before it as merely "a garden variety zoning dispute dressed up in the trappings of constitutional law." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988).

[14] This is contrary to prior Supreme Court rulings that local governments are not immune from liability in 42 U.S.C. Section 1983 actions, such as the instant case. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980). In *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 707 (1999), the Court rejected this notion: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny

manipulate the development review process. Intimidated applicants are ping-ponged from agency to agency or between agencies and courts in an often futile quest for those two illusory quarks, a "final" decision that is "ripe" for judicial review.[15]

Thus, it is not surprising that a recent survey of reported federal takings cases between 1990 and 1998 indicates that 83 percent of takings cases with an opinion reported by a U.S. District Court were dismissed on ripeness or abstention grounds. Of those landowners who could afford to bring an appeal, 64 percent still faced dismissal on jurisdictional grounds. On the average, the minority of property owners who received a determination that their takings claims could be adjudicated on the merits endured 9.6 years – almost a decade – of negotiation and litigation, just to get to this point.[16]

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under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim …."

[15] The federal courts' avoidance of takings claims is a common subject of analysis. See *e.g.*, Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. LAND USE & ENVT'L L. 91 (1994); Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights,* 29 CAL. WESTERN L. REV. 1 (1992); Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners,* 2 HOFSTRA PROP. L.J. 73 (1988).

[16] *See* J. Delaney and D. Desiderio, *Who Will Clean Up The 'Ripeness Mess'? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse.* 31 THE URB. LAW. 195, 203-204 (Spring, 1999). The survey actually understates the full extent of the problem in that it includes a number of special situations in which suit was legally required to be filed in federal court, including three cases involving the Tahoe Regional Planning

In his famous "plurality dissent" in *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621 (1981),[17] the late Justice William Brennan quoted the words of a municipal attorney to illustrate the regulatory abuses that can follow when finality and ripeness are misused by agencies to game the system:[18]

> At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow city attorneys the following advice:
>
> "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN. If legal maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the

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Agency (which under the operable compact can only be sued in federal court), the City of Chicago case which was removed by the City to federal court, the Resolution Trust case involving a federal defendant, and several others. An earlier survey by Gregory Overstreet indicated that over 90% of takings claimants are turned away at the courthouse door. *See* Note 15.

[17] In *San Diego Gas,* a plurality of the Supreme Court, agreeing with Justice Brennan, agreed for the first time since *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922) that an overreaching police power regulation could effect a taking requiring compensation. This was later confirmed in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

[18] *See* also Rodney L. Cobb, *Land Use Law: Marred by Public Agency Abuse*, 3 Wash. U. J. L. & Pol'y 195 (2000). Mr. Cobb was, for many years, Staff Counsel for the American Planning Association and was also Editor of LAND USE LAW AND ZONING DIGEST.

> recent [California] Supreme Court case of *Selby v. City of San Buena Ventura*, 10 Cal.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again .... See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations* (Including Inverse Condemnation), in 38B NIMLO MUNICIPAL LAW REVIEW 192-193 (1975) *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621, 655, n.22 (1981) (Brennan, J. Dissenting) (emphasis in original).

Abuses of the ripeness doctrine and its misapplication in the wake of *Williamson* have been noted by other eminent authorities. For example, an *Amicus Curiae* brief submitted to the Supreme Court by the American Planning Association ("APA") on behalf of a defendant planning agency in a takings case candidly recognized that current ripeness rules

> "invite[ ] local government to create a more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of [the ripeness requirement] Brief *Amicus Curiae* of the American Planning Association in support of Respondent,

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997).[19]

Professor Daniel R. Mandelker, in testifying on September 23, 1997, before the House Judiciary Committee, Subcommittee on Courts and Intellectual Property, expressed his view of ripeness requirements with respect to the Takings Clause as follows:

> It is my opinion that, based on the nature of the takings clause, property owners must first pursue some negotiation with land use officials to determine how far a regulation goes. However, I do not believe that ripeness barriers should be arbitrary, insurmountable or labyrinthine."[20]

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999) exemplifies the kind of labyrinthine case that Professor Mandelker was talking about. The developer submitted 19 different site plans and numerous applications over a period of years in a futile effort to obtain approval.[21] Each submission was designed to meet successively lower density levels recommended by the planning board.

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[19] Mandelker Testimony, 31 THE URB. LAW. 234, at 237 (Spring, 1999). Professor Mandelker was *Of Counsel* on the APA Brief. When the APA learned that portions of its *Amicus Brief* to the U.S. Supreme Court in *Suitum* would be cited by Professor Mandelker, in his testimony to Congressional Committees, APA President Eric Damian Kelly wrote to the Honorable Henry C. Hyde, Chair of the House Judiciary Committee, on September 16, 1997, to "repudiate" these portions of its brief. See Note 3.

[20] Mandelker Testimony, 31 THE URB. LAW. 234, at 239 (Spring, 1999). *See* Note 3.

[21] *See* J. Delaney and D. Desiderio, *Who will Clean Up the Ripeness Mess*, at 16.

Ultimately, the City refused to allow any development and a jury awarded compensation for a taking. Nine years had elapsed from submission of the first plan to a lower court's decision that the claim was ripe, without ever reaching the merits. Eight more years of litigation on the merits followed before the Supreme Court reviewed the case. While the property owners in *City of Monterey* ultimately prevailed, the land use labyrinth they were forced to navigate is by no means unique.[22]

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[22] *Id.* at 7-21. *See*, for example, the following cases involving multiple submissions of development plans, and lengthy agency reviews (often taking many years) culminating in dismissal of court challenges on ripeness grounds. *Id.* at 7-21: *Forseth v. Village of Sussex,* 20 F.Supp.2d 1267, 1272 (E.D. Wisc. 1998), *aff'd in part, rev'd in part,* 199 F.3d 363, 366 (7th Cir. 2000); *Good v. United States,* 39 Fed. Cl. 81, 101-103 (1997), *aff'd,* 189 F.3d 1355 (1999), *cert. denied,* 529 U.S. 1053 (2000); *2BD Ltd. P'ship v. County Comm'rs for Queen Anne's County,* 896 F.Supp. 518 (D.Md. 1995), *aff'd following remand,* 162 F.3d 1158 (4th Cir. 1998); *Schulze v. Milne,* 849 F.Supp. 708, 709 (N.D.Cal. 1994), *aff'd in part, rev'd in part on other grounds,* 98 F.3d 1346 (9th Cir. 1996); *Southview Assocs. v. Bongartz,* 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993); *Kaiser Development Co. v. City and County of Honolulu,* 649 F.Supp. 926, 940, 941 n. 19, 942 n. 21 (D. Hawaii 1986), *aff'd,* 898 F.2d 112 (9th Cir. 1990), *cert. denied,* 499 U.S. 947 (1991). State courts often emulate federal courts regarding finality and ripeness. A California state case typifies the situation that landowners can confront when seeking development approvals from state and local official, *e.g.*, *Healing v. California Coastal Comm'n*, 22 Cal. App. 4th 1158 (Ct. App. 1994).

CONCLUSION

For the foregoing reasons, the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF DANIEL R. MANDELKER AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF OF DANIEL R. MANDELKER AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

Daniel R. Mandelker has received the parties' written consent to file this brief as amicus curiae in support of the petitioner and the letters of consent have been filed with the Clerk of the Court.[1]

PROFESSOR MANDELKER'S INTEREST ARISES FROM HIS LIFELONG CONCERN WITH THE LAND USE PROCESS AND THE ROLE OF THE COURTS IN THAT PROCESS.

Daniel R. Mandelker is the Howard A. Stamper Professor of Law at Washington University in St. Louis where he teaches land use law, state and local government, environmental and land use litigation. Professor Mandelker is one of the country's leading scholars and teachers in land use law having authored a number of well-known and frequently used treatises and text books dealing with all aspects of land use law and litigation. His stature as a leading land use scholar and teacher has been continually affirmed by his many law review articles and his role as an invited lecturer in prestigious circumstances such as the Denham Lecture at Cambridge University.

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[1] No counsel for either party authored any part of this brief. No person or entity other than the law firm of Cox, Castle & Nicholson LLP, Professor Mandelker's counsel of record, has made any monetary contribution to the preparation or submission of this brief.

In addition to his teaching at Washington University and at numerous conferences, he has made presentations to such diverse groups as the United States Congress, the Federalist Society, the National Association of Home Builders and the American Planning Association. In fact, he served as the principal consultant on the American Planning Association's recently published two volume, *Growing Smart Legislative Handbook*.[2]

Professor Mandelker has no political axe to grind; his presentation to this Court is designed only to assist it in determining whether the issue presented by Franklin Kottschade's petition for certiorari is sufficiently important to justify the allocation of this Court's time to the issue.

SUMMARY OF THE ARGUMENT

The application by the lower federal courts of the Court's state compensation requirement, set forth in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), has made landowners asserting that their land has been taken – thereby entitling them to the federal Constitution's mandate of just compensation – second class citizens in that they, almost alone, are barred access to the federal

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[2] Professor Mandelker's biography may be found at http://law.wustl.edu\landuselaw\biography.html.

courts, a result which is justified by neither this Court's past opinions nor logic.

Further, the lower federal courts are split as to whether a mechanism exists allowing federal takings claims to be tried in federal courts after exhausting state compensation procedures.

This Court's grant of certiorari is needed to make clear just what *Williamson County* requires and allows.

ARGUMENT

I. THE APPROACH PRESENTLY BEING TAKEN BY THE LOWER COURTS DEPRIVES LANDOWNERS, WHO CLAIM A TAKING HAS OCCURRED, RIGHTS ROUTINELY GRANTED TO EVERY OTHER CITIZEN OF THE UNITED STATES

This Court held in *Williamson County* that a landowner must exhaust compensation remedies under state law before litigating his or her federal constitutional claims in federal court. (473 U.S. at 194-195.) Nothing in the Court's language in *Williamson County* indicated any desire on behalf of the Court to permanently debar a landowner from having a federal court consider claims that his or her land had been taken through governmental action. In fact, precisely because a constitutional violation is being

asserted, a federal court is at least as qualified as a state court to decide when the Fifth Amendment, made applicable to the states and, in the land use context, municipalities within a state, by the Fourteenth Amendment, have been violated. Indeed, a federal court is better able to make that decision where a citizen asserts solely federal claims.

One example – and it is only one out of many – of the problems that landowners face because of the lower federal courts' interpretation of the Court's rule in *Williamson County* is shown by the travail suffered by the landowner in *Santa Fe Village Venture v. City of Albuquerque*, 914 F.Supp. 478 (D.N.M. 1995). In that case, Albuquerque's City Council established a building moratorium to preclude any development on lands near a national monument site. The landowner had an option to purchase land within the area subject to the moratorium but never exercised that option because of the total land use restriction. Instead, it filed a lawsuit in federal district court seeking just compensation from Albuquerque on the theory that its inability to develop its property had resulted in a compensable taking. The district court dismissed the suit on ripeness grounds because the landowner had never sought compensation using a state court remedy. In other words, the district court held that exhausting the state compensation procedure was necessary in order to ripen the federal claim for resolution. The landowner then filed a second action for inverse condemnation in state court without raising any federal claims. However, the state court dismissed the complaint for lack of standing. After

exhausting state court proceedings, the landowner then filed a third suit, this time in federal court, under 42 U.S.C. § 1983 alleging only the deprivation of its federal rights, including takings, due process and equal protection. The district court responded by dismissing the federal action as again unripe, this time because the federal claims had not been raised in the state court proceedings even though the state court had already decided that the landowner lacked standing to bring its action there.

The *Santa Fe Village Venture* case is reflective of the unfortunately too often stated position of the lower federal courts that land use questions – and particularly takings claims – do not belong in federal court. See, *e.g.*, *Sameric Corp. of Delaware, Inc. v. City of Philadelphia*, 142 F.3d 582, 596 (3d Cir. 1998) ("We decline to federalize routine land-use decisions. Rather the validity of land-use decisions by local agencies ordinarily should be decided under state law in state courts."); *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir.), *cert. denied*, 528 U.S. 923 (1998) (Court of Appeals is not created to be "a Grand Mufti of local zoning boards ..."); *Boatman v. Town of Oakland*, 76 F.3d 341, 342 (11th Cir. 1996) ("The dispute in this [land use] case is not grist for the mill of a United States District Court; rather it belongs in the state court."); and *Polenze v. Parrott*, 883 F.2d 551, 558 (7th Cir. 1989) (federal courts "are not zoning boards of appeal."). Indeed the Seventh Circuit has gone so far as to demonstrate bemusement as to why any landowner would ever sue in the federal courts of the Seventh

Circuit because no landowner has ever won there. *River Park, Inc. v. City of Highland Park,*, 23 F.3d 164, 165 (7th Cir. 1994).

This dislike of land use cases is distinctly different from this Court's attitude which has been reviewing land use cases – in the takings context – for over a century. See, *e.g.*, *Mugler v. Kansas*, 123 U.S. 623 (1897), *Pennsylvania Coal Co. v.* Mahon, 260 U.S. 393 (1922), *Penn Central Transportation Co. v. City of New* York, 438 U.S. 104 (1978), *First English Evangelical Lutheran Church v. County of Los* Angeles, 482 U.S. 304 (1987), *Suitum v. Tahoe Regional Planning* Agency, 520 U.S. 725 (1997), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning* Agency, 535 U.S. 302 (2002).

If land use cases are worthy of this Court's time and attention, they should be just as worthy of the time and attention of the lower federal courts.

The lower federal courts' position is also distinctly different than that illustrated by this Court in numerous other situations involving the application of various portions of the Bill of Rights. For instance:

- Whether an artistic or literary work is obscene under the First Amendment is determined by "contemporary community standards" and definitions under "applicable state law." *Miller v. California*, 413 U.S. 15, 24 (1973)

- Local land use ordinances governing the location of "adult" uses are routinely reviewed by the federal courts to determine if they pass muster under the First Amendment. See, *e.g.*, *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986); and *Young v. American Mini Theaters*, 427 U.S. 50 (1976). For a more detailed discussion of federal cases involving the regulation of "adult" uses, see Mandelker, *Land Use Law*, §§ 5.58-.66 (5th ed. 2003) ("Mandelker").

- At the other end of the spectrum, federal courts have routinely looked at local land use regulation in the context of religious uses to see whether the local action violates the religious freedoms portion of the First Amendment. See, *e.g.*, *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Larkin v. Grendel's Den*, 459 U.S. 116 (1982). A more detailed discussion of federal cases involving the land use control of religious uses may be found in Mandelker, §§ 5.67-.70.

- Federal courts have not shied away from issues having to do with local land use control of advertising to determine whether limitations violate the protection of the First Amendment. See, *e.g.*, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S.

789 (1984), and *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981). For a more detailed discussion of land use controls involving signs and billboards, see Mandelker, §§ 11.06-23.

Suffice it to say that, in none of these areas – all of which involve restrictions imposed by local land use laws – has the Court required the landowner to first seek relief using state procedures. Quite simply, there is no principled reason why the protection provided by the Fifth and Fourteenth Amendments should place an almost insuperable hurdle in the path of a landowner who claims that his or her land has been taken.

> "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation ..." *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

II. THE APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL – CLAIM AND ISSUE PRECLUSION – MAY, OR MAY NOT, HAVE MADE IT IMPOSSIBLE TO EVER HAVE A FEDERAL COURT DETERMINE WHETHER A TAKING HAS OCCURRED

Under the abstention doctrine, a federal court may abstain from deciding federal constitutional issues

until after the federal court plaintiff has had his or her state law issues decided in a state court. *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). In order to return to the federal court for a resolution of the federal issues without either res judicata (claim preclusion) or collateral estoppel (issue preclusion) applying, the plaintiff must file an explicit reservation informing the state court of his or her federal claims and of his or her intent to return to federal court and thereafter limit the issues to those of state law. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). This Court emphasized the importance of the facts involved in the context of the federal claim when it explained why review by this Court was inadequate and why the plaintiff had a right to have a federal court determine the facts.

> "Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims." *England, supra,* 375 U.S. at 416.

England involved the situation where a case was initially filed in a federal court. However, the Eleventh Circuit held that the unique circumstances presented by this Court's decision in *Williamson County* made the procedure set forth in *England* applicable to takings claims first filed in a state court. *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299 (11th Cir. 1992) (res judicata and collateral estoppel applied where a plaintiff asserting a takings claim in state court had

failed to make an explicit reservation of his right to federal review of his takings claim). *Fields* is still good law in the Eleventh Circuit. See, *Saboff v. St. John's River Water Management Dist.*, 200 F.3d 1356, 1359-1360 (11th Cir. 2000).

The Fourth Circuit has endorsed the Eleventh Circuit's procedure. *Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*, 135 F.3d 275, 283 (4th Cir. 1998).

The Third Circuit, on the other hand, has held that a reservation of a federally based takings claim for review in a federal court in an action originally filed in a state court is ineffective because *England*, and the procedure authorized by the Eleventh Circuit in reliance on *England*, has no relevance in a situation where a takings claim is first commenced in state court. *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 n.3 (3d Cir. 1989).

The Ninth Circuit has, in a Solomon-like manner, split the baby down the middle. It has specifically held that an *England*-type reservation may be made in takings cases filed in a state court which will preserve the right to a federal action notwithstanding the doctrine of res judicata, *Montclair Parkowners Association v. City of Montclair*, 264 F.3d 829, 831 n.1 (9th Cir. 2001), while also holding that collateral estoppel – issue preclusion – bars relitigation of a takings claim in the federal courts. *Dodd v. Hood River County*, 136 F.3d

1219, 1227-1228 (9th Cir.), *cert denied*, 528 U.S. 923 (1998).

Aside from the simple unfairness of effectively depriving a landowner who claims the protection of the Fifth and Fourteenth Amendments by asserting a takings claim of the right have a federal court decide if a taking has occurred, the difference in the way in which the various Circuits have approached the problem requires the Court's resolution.

III. CONCLUSION

A quick glance at Shepard's *United States Citations* shows the success as a docket clearing mechanism of *Williamson County*'s requirement that a landowner asserting a takings claim first make use of state procedures. The almost automatic dismissal of takings claims filed initially in federal courts, because of their interpretation of the state compensation procedure, is contrary to the general rule, repeatedly expressed by this Court, that a refusal to exercise jurisdiction "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189 (1959), quoted in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

If the lower federal courts have misinterpreted this Court's holding in *Williamson County*, then this is the time to set them straight.

Even when this Court has specifically adopted a rule of procedure, it has not been afraid to reverse itself when it realizes that its original determination was incorrect. Compare *Erie RR v. Tompkins*, 304 U.S. 64 (1938), with *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

On the other hand, if the lower federal courts are proceeding precisely as this Court intended, then it is time for this Court to realize that it made an error in 1985 and that now is the time to correct that error.

Accordingly, Professor Mandelker respectfully requests that the Court grant Mr. Kottschade's petition for writ of certiorari.

DATED: July 21, 2003 Respectfully submitted,

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(5)

Supreme Court, U.S.
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No. 02-1848

IN THE

SUPREME COURT OF THE UNITED STATES

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF EVANDRO S. SANTINI AND SANTINI HOMES, INC. OF VERNON, CONNECTICUT, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI OF FRANKLIN P. KOTTSCHADE

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INTEREST OF EVANDRO S. SANTINI AND SANTINI HOMES, INC.[1]

Evandro Santini has built homes and apartments for 35 years in the suburbs of Hartford, Connecticut. After immigrating to the U.S. in 1957 at age 17, he served several apprenticeships in the building trades. He founded Santini Homes, Inc. in 1970, and has been its president ever since.

Mr. Santini and his company (hereinafter "Santini") have been litigating for the past nine years, through the Connecticut courts and now in the federal courts, a temporary taking claim that vividly illustrates the "conundrum" and the jurisdictional "Catch 22" created by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and discussed in the *Kottschade* petition. Santini's claim arises from a public agency's designation of his under-construction residential subdivision as a finalist for condemnation as a disposal site for low-level radioactive waste, and the resulting, total destruction of the property's economic use. The case is presently pending in the U.S. Court of Appeals for the Second Circuit, entitled *Santini v. Connecticut Hazardous Waste Management Service*, No. 02-9150. Oral argument occurred before Judges Newman, Parker, and Winter on June 16, 2003.

As of June 9, 1991, Santini was building a fully-approved residential subdivision on 74 acres in Ellington, Connecticut. He had been working on the project for six years and had invested $5 million and borrowed

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[1] Pursuant to Rule 37.6 of this Court, the *amici* state that their counsel authored this brief and the *amici* paid for it. This brief was not written in whole or in part by counsel for a party, and no one other than the *amici* made a monetary contribution to its preparation.

$4 million to finance it. The infrastructure and road system had been installed and four model homes were being shown to prospective buyers.

The Connecticut Hazardous Waste Management Service ("Service") is "a public instrumentality and political subdivision" of the State, *see* Conn. Gen. Stat. §§22a-134bb and 22a-163b. The Service's principal duty is to oversee the handling and disposal of radioactive materials, including the identification, acquisition, and construction within Connecticut of a disposal facility for low-level radioactive waste. *Id.* Connecticut's mandate to the Service to locate, condemn, and build an in-state disposal site was the direct result of a federal requirement to develop new state or regional disposal facilities, *see* Pub. L. No. 96-573, 94 Stat. 3347 (1980), codified at 42 U.S.C. §§2021b *et seq.* This mandate was accompanied by the threatened imposition of severe financial penalties on any state that did not meet certain deadlines. Connecticut adopted facility development legislation principally in 1987, Conn. Public Act 87-540.

On June 10, 1991, after two years of secret deliberations, the Service announced that the Santini development was one of three finalist sites (the other two being undeveloped land within 1.5 miles) for condemnation for public use as a disposal site for in-state generators (utilities, hospitals, universities, and industrial companies) of low-level radioactive waste. Shortly thereafter, the *Hartford Courant* displayed on its front page a map of the Santini subdivision next to the symbol for radioactivity.

Residents and public officials in Ellington and surrounding towns reacted to the announcement with protests and civil disobedience. In January 1992, Connecticut's governor proposed revocation of the agency's

mandate to condemn an in-state site, in favor of seeking a municipality to volunteer. The legislature took four months to adopt the revocation, which was signed into law on May 5, 1992. By this time, however, economic use of the Santini development had been completely destroyed, and this continued until at least June 1993.

Since, under *Williamson County*, Santini could not bring a threshold taking claim in federal court, he sued (in 1994) under the takings clause of the Connecticut Constitution Article I, §11 ("The property of no person shall be taken for public use, without just compensation therefor"). Since no state or local agency had jurisdiction over his predicament, he sued in state court. The Connecticut Supreme Court has confirmed the accuracy of Santini's pleading, holding that a Fifth Amendment taking claim *cannot be joined* with a state law taking claim brought in state court pursuant to *Williamson County*. *See Melillo v. New Haven*, 732 A.2d 133, 143 n.28 (Conn. 1999).

At the state court trial in early 1998, the real estate appraisers retained by both sides *agreed* that from June 1991 to June 1993, Santini was unable to sell any completed home or finished lot, develop remaining acreage, or generate *any* revenue.

Notwithstanding the exclusive state law basis of his taking claim, Santini expressly argued that the Connecticut courts, when interpreting the state's takings clause, must afford no less protection than is provided by the Takings Clause of the Fifth Amendment to the U.S. Constitution. Citing, for example, *Mills v. Rogers*, 457 U.S. 291 (1982) and *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980), Santini explained that decisions of this Court interpreting the Bill of Rights furnish the "floor" for protection of civil rights, and

thus in interpreting the state's taking clause, the Connecticut courts needed to adhere to Fifth Amendment tests and standards. In making this argument, Santini reviewed how Connecticut's two takings tests, which date to the 1960's and 1970's, were inconsistent with current federal standards, in particular this Court's takings tests as set forth in *Penn Central Transport. Co. v. New York City,* 438 U.S. 104 (1978) and *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) and their progeny.

The Connecticut Supreme Court, in November 1999, in a 5-2 *en banc* decision, affirmed a trial court denial of Santini's taking claim on the basis of two state law principles that are *plainly inconsistent* with this Court's takings jurisprudence. *Santini v. Connecticut Hazardous Waste Management Service,* 739 A.2d 680 (Conn. 1999). The court framed the dispositive issue as "whether mere government planning may constitute a taking, in the form of an inverse condemnation . . . ." It held that "mere governmental planning and temporary steps in anticipation of condemnation" do not, as a matter of Connecticut law, constitute a taking. It further held as a matter of state law that since the Service had never reached a "fixed and irreversible intent" to condemn the Santini property, no taking had occurred. The court cited *First English Evangelical Lutheran Church of Glendale v. Los Angeles County,* 482 U.S. 304, 320 (1987) as stating an analogous, one-factor taking test and a conclusion that "depreciation in value of the property by reason of preliminary [government] activity . . ." cannot constitute a taking.

Because it had resolved Santini's taking claim on these state law bases, the court noted, 739 A.2d at 688 n.19, that it was "not necessary to discuss the plaintiffs'

factual claims" of the economic impact of the June 1991 siting designation on their property. The court then rejected as irrelevant the takings jurisprudence of this Court (emphasis added):

> [T] he plaintiffs argue that we may not interpret the Connecticut Constitution so as to provide less protection for individual rights in the use of property than what they refer to as a "minimum, national standard for protection of individual rights in the use of property" as furnished by the "fifth amendment." In the plaintiffs' view, the constitutional doctrine that the federal constitution provides "minimum, national" standards means that, when the United States Constitution is interpreted to grant rights thereunder, our state constitution must be interpreted to grant at least the same level of protection as that granted by the federal constitution. *What is meant by that doctrine, however, is irrelevant to this case.*

739 A.2d at 688 n.20. The court did not explain further. Finally, the majority dismissed the relevance of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Lucas*, and *Penn Central* "because none of them involves mere planning by the government." 739 A.2d at 689.

Santini petitioned this Court for a writ of certiorari and was denied, 530 U.S. 1225 (2000).[2]

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[2] The Questions Presented were:

1. Whether a state court, adjudicating an inverse condemnation claim that a property owner has brought in that court under a state law provision because a Fifth Amendment takings claim is not yet ripe under this Court's holding in *Williamson County Regional Planning Commission v. Hamilton Bank*, must nonetheless adhere to the standards established by this Court's decisions interpreting the Takings Clause of the Fifth Amendment, and may not fashion it own, contrary takings standards.

[footnote continued]

Having satisfied the *Williamson County* state court requirement (after six years of litigation), Santini then brought a Fifth Amendment taking claim in federal district court in early 2001, No. 3:01 cv 562 (WWE). On August 27, 2002, the court (in an unpublished decision) granted the Service's Motion to Dismiss for lack of jurisdiction. After reciting undisputed facts regarding Santini's development during 1984-91, his vested property rights, and his investment-backed expectations prior to June 1991, the court turned to the *Rooker-Feldman* doctrine, describing it as depriving a federal court of subject matter jurisdiction if "the exercise of jurisdiction over that case would result in the reversal or modification of a state court judgment." *Rooker-Feldman's* prohibition, it said, reached not only claims expressly raised or decided in the state court, but all claims "inextricably intertwined," with the scope of "intertwined" being determined by applying the elements of res judicata and collateral estoppel.

The court then shifted its focus to *Williamson County* and observed that "federal law demarcates no clear approached to determine the preclusive effect of a previous state court action instituted . . . in order to satisfy

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2. Whether the Connecticut Supreme Court, adjudicating a claim that a state agency economically idled for two years property on which a subdivision was being built by designating that land as a low-level radioactive waste disposal facility, violated the Takings Clause of the Fifth Amendment by dismissing as "irrelevant" the standards established by this Court in *Penn Central Transportation Company v. New York City*, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, and *Lucas v. South Carolina Coastal Council*, and by holding that because the agency never demonstrated a "fixed and irreversible intent" to condemn, its action was "mere government planning" and could never be a temporary taking as a matter of law.

[its] ripeness requirement . . . ." It reviewed holdings of the Tenth and Eleventh Circuits that a Fifth Amendment claim *must* be raised in the state court proceedings. It then recited the contrary view of *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), that a federal taking claim *may* be brought after state court proceedings, but that the federal court must then determine whether the state court provided a determination "equivalent" to a federal adjucation, "so as to invoke . . . issue preclusion." The district court chose to follow *Dodd.* However, in conducting this search for an equivalent adjudication, the district court focused primarily on whether the Connecticut Supreme Court had engaged in a good faith effort to address the merits of the claim. It did not conduct a comparision of whether the Connecticut Supreme Court's 1999 adjudication of Santini's state law claim had employed or adhered to this Court's three-factor *Penn Central* test or its categorical *Lucas* formulation. The district court was also "unpersuaded . . . that collateral estoppel or *Rooker-Feldman* is inapplicable in light of the state court's failure to consider the tests set forth in *Lucas* and *Penn Central.*"[3]

In briefs and argument in the U.S. Court of Appeals for the Second Circuit, Santini argued principally that because he had no opportunity to litigate a Fifth Amendment claim in the state court, and because the Connecticut courts assuredly did not provide him with the equivalent of an adjudication under *Penn Central* and

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[3] Several days after the U.S. District Court issued its opinion in *Santini*, another federal district judge in the Second Circuit resolved nearly identical issues in favor of the property owner, declining to apply *Rooker-Feldman* or the preclusion rules. *See W.J.F. Realty Corp. v. Town of Southampton*, 220 F.Supp.2d 140 (E.D.N.Y. 2002). That case remains pending in the district court.

Lucas, the federal district court erred in dismissing the case on jurisdictional grounds.

SUMMARY OF ARGUMENT

The *Santini* case provides a compelling, current example of the confusion in the lower federal courts about the *Williamson County* state court requirement (Petition at 4-6), and how a property owner's ability to obtain an adjudication that adheres to this Court's taking tests and standards may be extinguished through the combination of state courts ignoring federal law and the lower federal courts applying preclusion rules (Petition at 12-13, 17-18).

ARGUMENT

THE *SANTINI* CASE ILLUSTRATES THE CONFUSION IN THE LOWER FEDERAL COURTS ABOUT THE *WILLIAMSON COUNTY* STATE COURT REQUIREMENT, AND HOW THE STATE AND LOWER FEDERAL COURTS ARE EMPLOYING PRECLUSION RULES TO EXTINGUISH FIFTH AMENDMENT TAKING CLAIMS WITHOUT ADDRESSING THEIR MERITS.

Santini has a textbook taking claim. In 1991, he was engaged in a benign and lawful use of his property, the development of a residential subdivision, for which he had all necessary permits and a vested right under Connecticut law. Prior to the Service's surprise June 10, 1991 designation of his land for public use for radioactive waste disposal, he had, in good faith reliance on his permits, invested more than $9 million. The Service's destruction of the development did not arise from a need to restrain Santini's development or ameliorate any resulting environmental impacts, but from the state legislature's mandate to freeze the development in order to

facilitate physical testing and finally determine the site's suitability for storage of radioactive waste; the Service was acting for its own purposes, for the benefit of dozens of Connecticut corporations, hospitals, utilities, and universities, and to avoid financial penalties being imposed on Connecticut taxpayers. For this public venture, Santini bore a devastating economic burden: for 24 months after the Service's June 1991 announcement, Santini could generate no revenue whatsoever from his development and his investment, and his investment-backed expectations and the property's economically beneficial use were destroyed.

In bringing his taking claim, Santini followed *Williamson County*. He brought a taking claim in state court under the takings clause of the Connecticut Constitution. His pleading choice in this regard has since been validated by this Court in *City of Monterey v. Del Monte Dunes,* 526 U.S. 687, 710 (1999) (a Fifth Amendment taking claim "did not accrue" until state court proceedings terminated), and in the Connecticut Supreme Court's previously-mentioned *Melillo* decision (plaintiffs were "not entitled to consideration of [a Fifth Amendment taking claim] because of the existence of a legally sufficient procedure, under [the Takings Clause of the Connecticut Constitution"]), 732 A.2d at 143 n.28.

The Connecticut Supreme Court opinion affirmatively violated this Court's Fifth Amendment Takings Clause jurisprudence in several ways. It rejected the principle that decisions of this Court interpreting the Fifth Amendment furnish minimum national standards for the analysis and adjudication of takings claims brought in state court under available state remedies. It dismissed as irrelevant, without explanation, the three-factor *Penn Central* test, *First English*'s recognition of temporary takings, and the

Lucas categorical formulation of a taking resulting from a total loss of economic use. Because of its application of state law principles, the Connecticut court found it unnecessary to analyze the economic impact of the Service's action on the Santini property; this inquiry, of course, constitutes the first factor of the *Penn Central* test and the starting point of the *Lucas* analysis. The state court declined to employ the principle of *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), that the purpose of the federal Takings Clause is to avoid having an individual bear an economic burden that should, in fairness, be borne by the general public. In addition, the Connecticut opinion employed a governmental "intent to condemn standard," in direct contradiction to such cases as *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (government's intent not relevant to takings analysis). The *Santini* state court decision erroneously elevated this Court's *First English* decision to a single-factor takings test based on whether the governmental activity may be characterized as "preliminary." Further, it stated, in *dictum*, that *all* takings claims require evidence of complete economic loss, thereby contravening several decisions of this Court that recognize taking claims based on partial economic loss. Finally, by employing an intent standard, the Connecticut court effectively eliminated inverse condemnation claims in Connecticut because an inverse taking, by definition, arises from a total or severe impact on economic use that has occurred *without* intent to formally condemn.[4]

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[4] In general, the Connecticut Supreme Court has held land use regulators to a lower standard of compliance with constitutional requirements than other governmental officials, such as police officers. In *Binette v. Sabo*, 710 A.2d 688, 699 (1998), addressing a substantive due process challenge based on police activity, the court compared constitutional liability of police

[footnote continued]

Thus, it is beyond argument that when Santini brought his taking claim in state court under state law, he most assuredly did not receive, expressly or implicitly, an adjudication that was consistent with this Court's Fifth Amendment standards.

And then the federal district court dismissed Santini's Fifth Amendment Takings Clause claim for lack of jurisdiction. The court, after expressing confusion about *Williamson County*, refused to recognize that between *Williamson County*'s mandate that he proceed in state court under state law and the Connecticut Supreme Court's affirmation that it had no jurisdiction to decide a joined federal taking claim, Santini had "no opportunity to litigate" his federal taking claim in the state court, making *Rooker-Feldman* and claim preclusion inapplicable. Moreover, the Connecticut Supreme Court's refusal to examine Santini's factual claim of economic loss should have been dispositive of the Service's defense of issue preclusion, because such consideration is a required element of the *Penn Central* and *Lucas* takings tests. Ultimately, the district court's conclusion that Santini had received the "functional equivalent" of a Fifth Amendment adjudication in the state court was fundamentally flawed because of the district court's failure to examine whether the Connecticut courts had expressly or implicitly addressed and necessarily decided the *Penn Central* factors or the elements of the *Lucas* analysis.

The *Santini* case illustrates the *Kottschade* petition's discussion of the analytical confusion in all courts about

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officers with that of land use regulators. After expressing a concern about imposing liability on members of planning and zoning commissions, the court stated, "In contrast, police officers are public employees who are expected – indeed, required – to comport themselves in accordance with constitutional standards."

the *Williamson County* state court requirement, and the use of preclusion rules by the lower federal courts to extinguish subsequent Fifth Amendment taking claims without ensuring or providing an adjudication on the merits. The draconian consequences of *Williamson County* are magnified when, as in *Santini,* state courts ignore this Court's takings jurisprudence when deciding takings claims brought to them in *Williamson County*-mandated proceedings.

The *Williamson County* state court requirement is desperately in need of clarification if not wholesale reconsideration. Property owners and their counsel are baffled as to how to plead these cases, the state courts are entirely inconsistent in the standards used in adjudicating takings claims,[5] and the federal district courts are confused as to whether or how to apply preclusion rules when faced with a property owner who has been denied compensation in state court and returns to federal court presenting, for the first time, a Fifth Amendment taking claim.

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[5] For a discussion of how the state courts have treated this Court's takings jurisprudence, *see* R. Rosenberg, "The Non-Impact of the United States Supreme Court Regulatory Takings Cases On the State Courts: Does The Supreme Court Really Matter?", 6 Fordham Envtl. L. J. 523 (1995).

CONCLUSION

For these reasons, *amici curiae* Evandro S. Santini and Santini Homes, Inc. respectfully and wholeheartedly support the granting of the Petition for Writ of Certiorari filed by Franklin P. Kottschade.

Respectfully submitted,

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July 21, 2003

(10)

No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ of Certiorari to
The U.S. Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* WISCONSIN BUILDERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), relieve state and local officials of the deterrent impact of compliance with the Civil Rights Act, 42 U.S.C. §1983?

2. Does the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), deprive federal takings claimants of the choice of courts afforded to them by 42 U.S.C. §1983?

3. Is Just Compensation denied at the time of a regulatory taking of private property, or is it denied only after a state court has ruled compensation is not owed?

4. Does the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), deprive federal takings claimants of the remedy afforded by 42 U.S.C. §1988?

5. Is the dismissal of federal takings claims mandated by *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), contrary to the provisions of Rule 18(b) of the Federal Rules of Civil Procedure?

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STATEMENT OF INTEREST

Amicus Curiae, Wisconsin Builders Association, hereinafter WBA, is a Wisconsin non-profit trade association comprised of more than 6,500 separate businesses across the State of Wisconsin engaged in residential and light commercial construction, remodeling and related industries.[1] Collectively, WBA's members employ more than 250,000 persons in the State of Wisconsin. One of WBA's principal policy goals is the promotion of legal and public policies that lead to greater availability, quality, and affordability of housing and commercial property for the people and businesses of Wisconsin.

Increasingly today, the media and local officials are heard loudly asserting that housing affordability is becoming a housing affordability crisis. As the cost of providing housing continues to rise, WBA has concluded that the rise in housing costs is disproportionately attributable to government regulation of the land upon which its members must build, a conclusion born out by the results of a recent Harvard University study.[2] Over the

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[1] Counsel for all parties have filed standing consents with the Clerk of the Court to the filing of *amicus* briefs by any party. Sup. Ct. R. 37.3. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *Amicus* or its counsel, made a monetary contribution to this brief's preparation or submission. Sup. Ct. R. 37.6..

[2] E. Glaeser and J. Gyourko, *The Impact of Zoning on Housing Affordability,* (Harvard Institute of Economic Research, Discussion Paper No. 1948, 2002), prepared for the conference on "Policies to Promote Affordable Housing," sponsored by the Federal Reserve Bank of New York and the New York University School of law. The authors' introduction states: "Does America face an affordable housing crisis and, if so, why? This paper argues that in much of America the price of housing is quite close to the marginal, physical costs of new construction. The price of housing is significantly higher than

years, as the portion of the cost of housing attributable to land continues to rise, WBA has come to recognize that it must play a role in the land use regulatory process. If WBA hopes to preserve the affordability of the product its members provide, it must address the factors increasing the cost of land.

Many years ago, WBA undertook to be involved in the legislative process, so that, as legislation affecting land came under consideration, its voice would be heard. Increasingly, however, WBA has observed that the courts, by permitting or limiting the ways state and local officials administer land use, play a substantial role in shaping the regulatory environment within which housing must be produced and marketed.

WBA recognizes the strong societal interest in and need for land use regulation. At the same time, however, it recognizes, as has this Court, that there can be instances where those regulating the land may go too far. When this happens, the cost of land unnecessarily rises. WBA seeks to prevent or limit the occasions in which government "goes too far."

Once government has "gone too far," WBA believes it is essential that the courts properly and effectively address the issue and redress those responsible. WBA believes that those who would violate the civil rights of a property owner must understand that they are subject to the provisions of 42 U.S.C. §1983, when they act "under color of state law."

All too often, the victims of such actions are small land owners, lacking the financial ability to insist that government respect their rights. In Wisconsin, large

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construction costs only in a limited number of areas, such as California and some eastern cities. In those areas, we argue that high prices have little to do with conventional models with a free market for land. Instead, our evidence suggests that zoning and other land use controls play the dominant role in making housing expensive."

homebuilders are the exception, and not the rule. WBA has approximately 2,000 builder members, but more than 75 percent of them build ten or fewer houses a year.

For this vast majority of Wisconsin builders, an investment in land rendered unusable by improper land use regulation can have catastrophic consequences for its owner, often ending in bankruptcy or foreclosure. It is neither irrelevant nor lost upon those contemplating a challenge to an improper regulation that *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), was prosecuted, not by the land owner, but by the bank that foreclosed upon the owner.

Amicus would assert that local officials, too, know that, by improperly refusing a permit, they can bankrupt a claimant, or, at a minimum, cause the claimant sufficient financial difficulty that the claimant will have no choice but to abandon a valid claim, rather than pursue a legal remedy at prohibitive expense.

WBA believes it is imperative that when the civil rights of a property owner are violated by state or local officials, the remedies afforded by 42 U.S.C. §1988, The Civil Rights Attorney's Fees Awards Act of 1976, must be available to the victim. Today, under *Williamson*, they are not.

Thus, a possible claimant, confronted by the *Williamson* requirement that available state claims be pursued first, undertakes state court litigation knowing the cost of such a suit is his to bear, alone. At the same time, a local official, contemplating the imposition of inappropriate conditions, does so with the knowledge that each person he regulates will have to confront and bear this financial burden as the necessary cost of a challenge to its actions.

WBA believes local units of government are emboldened by property owners repeatedly abandoning valid claims because the value of those claims may not

exceed the cost of justice. Repeated surrenders by property owners to the loss of their civil rights, acquiescing in improper exactions to obtain an already-deserved project approval, in our experience, encourages local officials to impose ever greater, more onerous demands.

Wisconsin, like many states, has a constitutional provision almost identical to the Fifth Amendment prohibition against uncompensated takings of private property.[3] Under *Williamson*, a Wisconsin claimant cannot bring a federal takings claim, in federal court, without first obtaining an adverse ruling by a state court on the factually identical, but legally separate, state constitutional claim. Only then can a claimant allege, under *Williamson*, that the state has "denied just compensation." If the claimant wins on his factually identical state constitutional claim, he may win compensation, but he has no pending federal claim on which to seek the remedies afforded under the Civil Rights Act.

WBA files this brief to urge this Court to grant certiorari review to the Petitioner, to revisit, and hopefully to change, its ruling in *Williamson*.

INTRODUCTION

WBA asks this Court to revise or overrule its prior ruling in *Williamson* because it effectively repeals the Civil Rights Act, 42 U.S.C. §1983, at least as it is applied to takings claims under the Fifth and Fourteenth Amendments to the United States Constitution.

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[3] WIS. CONST., art. 1, §13. The property of no person shall be taken for public use without just compensation therefor.

An important goal of 42 U.S.C. §1983, is the deterrence of individuals in positions of authority from using their powers to deprive those they regulate of their constitutional rights. *Williamson* releases land use regulators from these consequences.

A second goal of Congress under 42 U.S.C. §1983, is to open the federal courts to individuals claiming state or local officials have deprived them of rights guaranteed to them under the Constitution, so that they need not rely upon locally-elected judges to rule upon their claims. *Williamson* has closed the federal courts to constitutional takings litigants.

To assure the protections of the Civil Rights Act were available to all citizens, and not just to the wealthy, Congress enacted 42 U.S.C. §1988, The Civil Rights Attorney's Fees Awards Act of 1976. It enables a court to award reasonable attorney's fees and expert witness fees to a prevailing civil rights litigant. *Williamson* deprives property owners of this remedy.

I. THERE IS NO DETERRENCE IN THE COURT-ORDERED DISMISSAL OF FEDERAL TAKINGS CLAIMS.

The Bill of Rights, U.S. CONST., amends. I-X, was adopted to protect the civil rights of the people of the United States. The Fourteenth Amendment to the Constitution was adopted to prohibit the states from taking any action that would abridge the privileges or immunities of citizens of the United States. It expressly precludes the states from depriving any person of life, liberty or property without due process of law, and from denying any person the equal protection of the laws.

The mere existence of these constitutional limitations upon the powers of the state was deemed insufficient by

Congress to assure that states would respect these rights. Congress properly concluded the rights of the people are meaningless if public officials freely, or with impunity, choose to ignore them. Thus, Congress attached consequences to the violation or deprivation of these rights by those in positions of authority. It is an unfortunate reality that it is the penalty, and not the prohibition, that causes most people to obey speed limits.

Following adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, Congress observed that the rights assured by these amendments were being systematically disregarded in the former slave states. The Ku Klux Klan had been formed to terrorize and intimidate the freemen, as part of an effort to prevent them from exercising the rights recently granted to them. Local officials, it was believed, actively colluded with, or were intimidated by, the Klan to deprive recently freed slaves of the rights assured to them by the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution.[4] [5] [6] Congress

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[4] Excerpted from Debate before House of Representatives, on passage of Ku Klux Act of April 20, 1871, CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871). Representative William Stoughton, of Michigan, relates testimony before a House Committee of James E. Boyd:

> Question. What is your knowledge of the object and extent of this organization throughout the State?
>
> Answer. I can only state from hearsay-what I have heard from members of the organization. The number of the members of the organization is supposed to be forty thousand. Their object was the overthrow of the reconstruction policy of Congress and the disfranchisement of the negro.

[5] Excerpted from Debate before House of Representatives, on passage of Ku Klux Act of April 20, 1871, CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871). In this section, Representative William Stoughton, of Michigan, relates testimony before a House Committee of the Hon. Thomas Settle:

feared the state courts were in collusion with, sympathetic to or intimidated by the Klan. Fearing that filing a state court action failed to provide an adequate remedy for the protection of these rights, Congress enacted the Ku Klux Act of 1871 in response. The relevant parts of that Act survive today, in essentially the same form, as 42 U.S.C. §1983.

In so doing, Congress created a federal civil remedy to open the federal courts to civil rights claimants. Then, as

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> Question. What has been the effect on the public mind with reference to the security of person and property, of these outrages, and the difficulty in the way of punishment? Answer. Well, sir, I suppose any candid man in North Carolina would tell you it is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages. The defect lies not so much with the courts as with the juries. You cannot get a conviction; you cannot get a bill found by the grand jury, or if you do, the petit jury acquits the parties. In my official capacity I sit with Judge Pearson and Judge Dick. Judge Pearson issued a bench warrant last summer for some parties, and had them brought before him at Raleigh. He requested Judge Dick and myself to meet him. We did so, and the trial extended over three weeks, and there it came to our knowledge that it was the duty and obligation of members of this secret organization to put themselves in the way to be summoned as jurors, to acquit the accused, or to have themselves summoned as witnesses to prove an *alibi*.

[6] Excerpted from Debate before House of Representatives, on passage of Ku Klux Act of April 20, 1871, CONG. GLOBE, 42nd Cong., 1st Sess. 321 (1871). In this section, Representative William Stoughton, of Michigan, argues in favor o. adoption of the Ku Klux Act of 1871:

> The whole South, Mr. Speaker, is rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison. There is no security for life, person, or property. The State authorities and local courts are unable or unwilling to check the evil or punish the criminals.

now, federal judges were appointed for life, unlike state court judges, who customarily must stand for election periodically. It is commonly theorized that this distinction serves to make federal judges less susceptible to the political pressures affecting locally-elected judges. Thus, it is argued, the Civil Rights Act sought to allow civil rights claimants the opportunity, at their option, to have their claims heard before federal judges who were not subject to local political pressures.

Congress, in enacting the Ku Klux Act, made local and state officials violating the civil rights of those they regulate personally liable to their victims for damages. *Amicus* argues that Congress intended then, and today, that this personal liability provision would serve as a deterrent to those in a position to miss-use state power. When local officials recognize that a failure to respect the civil rights of those they govern can affect them personally, they will be less likely to disregard those rights as they govern. The converse is equally true.

Amicus contends that the goal of the deterrent implications of the Civil Rights Act is to discourage constitutional deprivations in the first place. It is not an inexpensive proposition to have to litigate to obtain approvals or compensation that should have been forthcoming in the first place.

In deciding *Williamson*, at p. 195, this Court concluded that a post-deprivation remedy, such as was found sufficient in *Parratt v. Taylor*, 451 U.S. 527 (1981), satisfied the Constitution. In so holding, however, no consideration was given to the deterrence objective of the Civil Rights Act.

Litigating a takings claim, at any level, is an expensive proposition for the property owner who must do so in order to obtain a permit that was wrongfully denied. The cost of the litigation must be added on to the cost of doing the

project, while contributing nothing to its value, unnecessarily delaying the commencement of the project for years. Ideally, local officials would exercise the powers conferred upon them with a recognition of the rights of those they regulate and the limitations placed upon them by the Constitution.

Amicus fears the absence of consequences for local officials encourages, rather than discourages, inappropriate regulatory behavior. Every cop on a beat is expected to be aware of and respect the constitutional rights of those she deals with. Every cop knows she has personal exposure when she crosses constitutional lines.

There are no such lines for local land use officials. Instead, they know, and quickly point out, as in the instant case, that a property owner cannot sue them for federal civil rights violations.

As things currently stand, post-*Williamson*, the state court litigation that is brought does not include a claim against those officials. State courts, certainly Wisconsin's, routinely dismiss federal takings claims, on ripeness grounds, citing *Williamson* as the justification for doing so. *Eberle v. Dane County Board of Adjustment*, 227 Wis. 2d 609, ¶¶46-48, 595 N.W. 2d 730, 745 (1999). Whatever deterrent affect Congress hoped to create is lost when state or local officials know that all federal claims brought against them will be dismissed under *Williamson*, that any litigation which does proceed will be based solely upon laws which do not hold them personally liable.

II. *WILLIAMSON* DEPRIVES TAKINGS LITIGANTS OF A CHOICE OF COURTS.

Williamson (473.U.S. at 196), holds that a takings claimant must first ask for available state relief, in state

court, before claiming that the state has taken his property without just compensation. It thus dismissed the federal action, compelling the claimant to proceed first to state court.

The decision did not provide, as perhaps it could, that the federal district court would first explore the availability of relief under state theories, as a court of concurrent jurisdiction, holding the federal claims in abeyance. Had it done this, the Court would have acted consistently with the goal of the Civil Rights Act to open the federal courts to civil rights claimants.

More importantly, the *Williamson* Court, having found that it first needed to know whether the state would provide just compensation, could, or should, have ruled that allowing the case to proceed in federal court was compelled by Fed. R. Civ. P. Rule 18(b), which expressly permits a party to join together in one lawsuit two claims, one of which is only cognizable after another claim has been prosecuted to a conclusion. It did not, however, sending the claimant instead to state court.

The Court should not lose sight of the facts which gave rise to the Ku Klux Act of 1871. The testimony presented to Congress called attention to the possibility that local politics might impact the impartiality of locally-elected judges. If a takings claimant believes local politics are such that a locally-elected judge would be under great political pressure when ruling upon the claimant's case, the Civil Rights Act suggests it is Congressional intent that the claimant have the choice of going to a federal court.

Unless the availability of this choice is now deemed inconsequential, or of no legal significance, the *Williamson* mandate would seem to deprive takings litigants of an important, Congressionally-bestowed, choice of forums.

A takings litigant asks a court to rule as to the propriety of a local governmental action. He may need to ask the

Court to allow him to move forward with a permitted, but sometimes politically unpopular, project. He may need to ask the Court to award him just compensation, or compensatory damages, which may ultimately prove to be substantial or politically unpopular.

It is not enough to say *Williamson* purports to allow a claimant denied compensation by a state court to subsequently seek relief in federal court, if the federal courts then must apply principles of issue and claim preclusion, adopting as their own, the rulings of the state courts the choice of forums was intended to allow a claimant to bypass. Such a course offers no choice of forum to this unique class of civil rights claimants.

The Bill of Rights was enacted to limit the power of government over the individual. The protections afforded by the Civil Rights Act are broader in that they are not limited to the protection of the rights set forth in the Bill of Rights. Rather, the Civil Rights Act prohibits the deprivation of the rights secured by the Constitution **and the laws.**

WBA would contend that the choice of forum afforded by Congress to civil rights claimants under the Civil Rights Act is one of the "rights, [or] privileges. . . secured by the Constitution and the laws." 42 U.S.C. §1983. As such, this Court cannot deprive citizens of that choice, unless this Court also finds that offering a takings claimant such a choice was not intended by Congress, or that Congress exceeded its authority in enacting that law, or that the law itself is unconstitutional.

III. AN UNCOMPENSATED TAKING OCCURS WHEN PROPERTY IS TAKEN AND COMPENSATION IS NEITHER PAID, NOR THE DUTY TO PAY IT ACKNOWLEDGED, AT THAT TIME.

Under *Williamson* (473 U.S. at 195), the City of Rochester's denial of all use of Mr. Kottschade's land represents only a taking. To be actionable in federal court, the state must also have denied just compensation to Mr. Kottschade. A federal court is not allowed to consider whether a taking prohibited under the federal constitution has occurred, for which compensation is due, until after a state court has ruled that compensation is not owed.

Taking *Williamson* on its face, if the Minnesota state courts would rule that the actions of the City of Rochester were improper, and amounted to a taking, but the same courts refused to grant just compensation, Mr. Kottschade would be entitled to pursue relief in federal court. Setting aside for the moment the questions raised by claim and issue preclusion, the logical first question that must be answered by Mr. Kottschade before filing his claim in federal court would be, "Who denied just compensation to me? Was it the City of Rochester, whose actions constituted a taking, or was it the state court that refused to award just compensation?"

Logically, only the City, or the individual city officials responsible for its actions, while acting under color of state law, could have denied compensation, since it is the City that the state court would have ordered to pay compensation if it had found compensation to be owed. Just as logically, the state court could not be liable for the payment of compensation, since it had done nothing constituting a taking, for which it could be found to owe compensation.

The problem with this conclusion lies in the fact that, if a state court found, instead, that the City of Rochester had taken Mr. Kottschade's property, and that it owed just compensation, all of the City's actions giving rise to both conclusions would have occurred prior to commencement of the state takings claim.

The flaw in the ruling in *Williamson* lies in the fact that, once the state takings claim is filed, all of the agency actions giving rise to the takings claim, as well as to the claim that just compensation has been denied, have already taken place. If all of the actions needed to give rise to a federal takings claim have already occurred, there is no logical basis to contend that the claim is not ripe for federal adjudication. The only way this could not be true is if the actions of the state court were deemed, for federal ripeness purposes, to be those of the City of Rochester.

Further demonstrating the flaw in *Williamson* would be a takings case brought in Wisconsin, which has a state constitution provision whose wording is essentially identical to the Fifth Amendment prohibition.[7] In Wisconsin, unlike Tennessee, and possibly Minnesota, inverse condemnation is not available as a remedy for a regulatory taking, compelling a takings claimant in Wisconsin to bring suit directly under the state constitution.[8] Given the strong similarity between the state and federal constitutional provisions, a Wisconsin plaintiff would need to make the same factual allegations as a

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[7] WIS. CONST., art. 1, §13, states: "The property of no person shall be taken for public use without just compensation therefore." By comparison, U.S. CONST., amend. V, states, in relevant part: "Nor shall private property be taken for public use, without just compensation."

[8] *Zinn v. State*, 112 Wis.2d 417, 428-429, 334 N.W.2d 67 (1983), citing therein to *United States v. Clarke*, 445 U.S. 253, 257 (1980), quoting J. Sackman, *Nichols' Law of Eminent Domain* Sec. 25.41 (3d ed. 1980).

federal takings claimant to establish first, that a taking had occurred, and second, that just compensation was due. The factual proof needed to show a state constitutional violation would be identical to that for a federal violation.

Applying *Williamson*'s logic,[9] the state constitutional claimant, faced with legally identical constitutional provisions, would not have a ripe state claim either, because no court would have previously ruled that he was not entitled to compensation. If this is not so, what, in the wording of the state constitution, compels a different outcome than that compelled by *Williamson*'s reading of the federal constitution?

Amicus contends the failure, or refusal, of a unit of government to pay just compensation at the time of a regulatory taking logically infers an intention, on the part of that unit of government, to take the regulated property, through regulation, without paying just compensation. The mere fact the unit of government has resisted such a determination, compelling resort to the courts, demonstrates both its intention to keep what it has taken, as well as its intention to retain that property without paying for it.

The states are well versed in providing just compensation for temporary takings of property when exercising their powers of eminent domain. It is common for them, in the course of constructing road improvements, to acquire a temporary easement, for example, in lands that are only needed as a staging area for a construction project, lands for which the state has no continuing need following completion of construction.

In such cases, the state or local unit of government typically acquires an easement to use the lands for a limited period of time. In Wisconsin, at least, the state declares its

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[9] "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson*, 473 U.S. at 194.

intention and identifies the parcel it intends to temporarily acquire, offers, and then pays, just compensation to the owner for the lands to be taken, at the time of taking. Compensation is typically set, by common practice, at ten percent of the estimated fair market value of the land taken, per annum, prorated over the length of the temporary taking. Typically, this compensation is paid to the owner, in advance, at the commencement of the taking.

The significant part of this process, *Amicus* would argue, is the acknowledgment by government, before litigation, of its liability for just compensation for the lands to be taken.

Disagreements may arise between an owner and the state as to the amount of compensation owed, but these disputes follow the acknowledgement by the state that compensation is due.

Mr. Kottschade, like most takings claimants, contends, and for purposes of a motion to dismiss, the Court must assume, that the City of Rochester's actions have already improperly taken his lands. He asks this Court to award him just compensation because, while the City has taken his lands, it refuses and has not yet compensated him for that taking. Rather than acknowledge its liability for just compensation, the City of Rochester apparently refuses to discontinue those of its actions which are alleged to constitute a taking, and further denies liability for, and has refused to pay, that compensation. Thus, *Amicus* would argue, both the taking and the denial of just compensation have already occurred. Under this analysis, the federal takings claim, like the parallel (and legally identical) state claim, is ripe for adjudication, because the City has failed, or refused, to acknowledge an obligation to pay just compensation, while it refuses to end its taking of Mr. Kottschade's land.

IV. THE RULING IN *WILLIAMSON* DEPRIVES SUCCESSFUL TAKINGS LITIGANTS OF THE BENEFITS OF §42 U.S.C. 1988.

Williamson, 473.U.S. at 200, directed federal courts to dismiss federal takings claims, on ripeness grounds, compelling claimants to first pursue available state remedies in state courts. Taking their lead from *Williamson*, state courts also dismiss federal takings claims on ripeness grounds, requiring claimants to first pursue available state takings claims.[10] Consequently, a successful state takings claimant has no pending federal claim when he asks the court for costs and witness fees.

While *Hensley v. Eckerhart* 461 U.S. 424, 434-35, (1983), enables a successful litigant on a parallel state claim to assume prevailing party status on a pending federal civil rights claim, a successful post-*Williamson* litigant on a parallel state takings claim, following dismissal of his federal claims, has no pending federal claim, and is denied the benefits of 42 U.S.C. §1988. [11] [12]

In Wisconsin, as in many states, principals of sovereign immunity prohibit the recovery of attorneys' fees from the state in the absence of a statute expressly authorizing such recovery. *Martineau v. State Conservation Comm.*, 54 Wis.2d 76, 79, 194 N.W.2d 664, 666 (1972). After finding a temporary regulatory taking under the state constitution, but finding no statute authorizing recovery of attorneys' fees in such a case, the Wisconsin Court of Appeals has concluded the successful litigant is not entitled to recover attorneys' fees.[13]

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[10] *Eberle*, 227 Wis. 2d at ¶48.
[11] *Eberle*, 227 Wis. 2d at ¶50.
[12] *Eberle*, 227 Wis. 2d at ¶55.
[13] *W.H. Pugh Coal Co. v. State*, 157 Wis.2d 620, 634-635, 460 N.W.2d 787, 792-793 (Ct.App. 1990).

The ruling in *Williamson* requires a claimant to establish the unavailability of a state remedy as a precondition to the existence of a federally-cognizable takings claim. Such a claimant, it holds, could not, following an unsuccessful trial, claim state deprivation of just compensation, because he could still not demonstrate, short of the exhaustion of all state court appeal rights, that state-awarded just compensation was not available. Thus, the claimant wishing to have a federal court consider his takings claim, faces many years before the trial court, intermediate and supreme courts of the state court system, along with the extraordinary legal costs such lengthy and prolonged litigation entails, all of which he must bear alone.

On first reading, the conditions imposed upon entry to the federal courts by a federal takings claimant seem less onerous than they have proven to be. One can speculate the Court did not contemplate it was requiring a federal takings claimant to bear alone the cost of first pursuing his claim all the way through the state court system just to ripen that claim sufficiently to have it heard in a federal district court.

In *Williamson*, at p. 196, this Court concluded the claimant should first pursue an available state inverse condemnation claim. The parties before the Court in that case did not need to raise the loss of eligibility for the benefits accorded to a successful litigant under 42 U.S.C. §1988, because, under Tennessee law, a successful inverse condemnation claimant, is also entitled to recover reasonable attorneys' fees.[14] The choice of remedy, in that

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[14] Tenn. Code Ann., §29-16-123(b), provides, in relevant part, as follows: Additionally, the court rendering a judgment for the plaintiff in a proceeding brought under subsection (a) . . . shall determine and award or allow to such plaintiff, as a part of such judgment or settlement such sum as will in the opinion of the court . . . reimburse such plaintiff for reasonable costs, disbursements and expenses,

case, did not serve to deprive the claimant of recovery of those fees. Thus, logically, this question was not presented to the Court for its consideration.

When, however, in states such as Wisconsin, where inverse condemnation is not an available remedy to a regulatory takings claimant,[15] and the only available state remedy consists of a claim directly under the parallel state constitution, with no state statute comparable to 42 U.S.C. §1988, allowing recovery of attorneys' fees, the unavailability of that remedy to a takings claimant presents a question not previously addressed by this Court.

In *Williamson*, at pp. 196-197, the Court concluded that: "Respondent **has not shown that the inverse condemnation procedure is unavailable or inadequate**, and until it has utilized that procedure, its taking claim is premature." (Emphasis supplied.) The Court's conclusions in *Williamson* are not universally true, but the ruling is being universally applied. Where inverse condemnation is not available to a regulatory takings claimant, such as in Wisconsin, and where a successful takings claimant has no state procedure providing for the recovery of attorneys' fees, application of *Williamson* deprives litigants of the benefits of 42 U.S.C. §1988.

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including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

[15] *Zinn*, 112 Wis.2d at 433.

V. FEDERAL RULE OF CIVIL PROCEDURE 18(B) SPECIFICALLY ALLOWS MR. KOTTSCHADE TO JOIN RIPE AND UNRIPE TAKINGS CLAIMS IN ONE FEDERAL COURT ACTION.

Fed. R. Civ. P. Rule 18(b) provides, in relevant part, as follows:

> Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action. . .

This Court has not previously addressed the applicability of this rule to a *Williamson* ripeness question, involving the impact upon a federal takings claim of the availability of a parallel state remedy. *Amicus* contends the preferable way for the federal courts to address this question would be to provide that the federal court first address the available state remedies, while holding in abeyance the pending federal claims. More importantly, *Amicus* contends, given the express right of a litigant to join a ripe state claim with an unripe federal claim in one proceeding, the dismissal of the federal claim is contrary to the procedural rules of this Court.

Allowing a claimant to proceed in accordance with this Rule would afford the choice of forum Congress intended to give to civil rights litigants. Holding open a 42 U.S.C. §1983 claim would also provide the deterrent to local officials Congress intended. It would also assure successful takings claimants, in states such as Wisconsin that do not provide for the recovery of litigation costs and attorneys' fees, that all citizens, in all states, will have equal access to justice in the courts.

CONCLUSION

Amicus Curiae, the Wisconsin Builders Association, respectfully asks this Court to grant the petition of Mr. Frank Kottschade for Certiorari Review of the ruling of the Court of Appeals for the Eighth Circuit, so that this Court can revisit, and hopefully change, its ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*.

Respectfully submitted,.

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In The
Supreme Court of the United States

FRANKLIN P. KOTTSCHADE
Petitioner,

v.

CITY OF ROCHESTER
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF DEFENDERS OF PROPERTY RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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26 pp

QUESTIONS PRESENTED

Amicus curiae will address the following issues presented for review:

1. Is the rule of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (requiring that a just compensation case be litigated in state court before the federal court has jurisdiction to hear it), still valid in light of the subsequently developed law of regulatory takings, *see, e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 303 (1987)?

2. Does *Williamson County* irreconcilably conflict with the existing law of issue preclusion?

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Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the framers of the Constitution and to promote the exercise of governmental power consistent with the constitutional limitations upon the exercise of that power. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode*

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, no persons other than *amicus curiae*

Island, 533 U.S. 606 (2001); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

STATEMENT OF THE CASE

Franklin P. Kottschade, a developer in the city of Rochester, Minnesota, acquired a 16.4-acre parcel of land there in 1992 on which he planned to develop a townhouse project. The City finally issued him a permit in 2000, after it rejected four of his development proposals. The City attached conditions to the permit that made the townhouse

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contributed financially to the preparation of this brief.

project economically unfeasible. These conditions included a drastic reduction in the number of homes (from 104 to 26) and an added per-unit development cost of $70,000.

Mr. Kottschade sued the City in federal district court under 42 U.S.C. § 1983, alleging a regulatory taking of private property requiring just compensation under the Fifth Amendment.[2] The district court and the Eighth Circuit both dismissed the claim as unripe per *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which requires Mr. Kottschade to first seek redress for the alleged federal constitutional violation in state court before seeking relief in federal court.

Mr. Kottschade brought this petition to request that this Court square this requirement with its decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), in which the Court held that a municipal

[2] "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

government sued for a regulatory taking in state court could remove the case to federal court on the grounds that the action was a federal question over which federal district courts had original jurisdiction.

REASONS FOR GRANTING THE PETITION

I. The Rule of *Williamson County* Appears to Conflict With Subsequently Decided Regulatory Taking Cases, *e.g., First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 303 (1987), Holding That the Right to Just Compensation Arises Immediately Upon the Owner's Deprivation of Property By the Government

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), was decided two terms before this Court set forth the rule that a state must provide a just compensation remedy for regulatory takings, *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 303, 321 (1987), at a time when the existence of that constitutional right was in doubt.

See Williamson County, 473 U.S. at 203 n.4 (Stevens, J. concurring) ("The fact that a jurist as eminent as Oliver Wendell Holmes characterized a regulation that 'goes too far' as a 'taking' does not mean that such a regulation may never be canceled and must always give rise to a right to compensation"). The dimensions and qualities of this right have subsequently been expounded in a long line of cases. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). The time has come for this Court to re-examine *Williamson County* in light of this developed regulatory takings jurisprudence.

In *First English*, this Court held that a state's refusal to afford a just compensation remedy for private property taken for public use violated the Fifth Amendment's self-

executing guarantee. *See First English*, 482 U.S. at 315 ("We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation . . .'") (citing *United States* v. *Clarke*, 445 U.S. 253, 257 (1980); *Jacobs v. United States*, 290 U.S. 13, 16 (1933)). In so doing, this Court specifically rejected the suggestion that this damages remedy was dependent on statute: "The cases cited in the text, we think, refute the argument of the United States that 'the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'" *See First English,* 482 U.S. at 316 n.9.

In *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), this Court further described the nature of the just compensation remedy: "When the government repudiates this duty, either by denying just compensation in fact or by refusing to provide procedures through which compensation may be sought, it violates the Constitution." *Del Monte*

Dunes, 526 U.S. at 717 (citations omitted). This rule has been recently reaffirmed by this Court. *See, e.g., Brown v. Legal Foundation of Washington*, 123 S. Ct. 1406 (2003); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

The rule of *Williamson County*--that the taking has not occurred until *after* the property owner has sued for just compensation in state court and lost would appear to be irreconcilable with the holding that the right to just compensation arises at the time the property owner is deprived of his property. *See Del Monte Dunes,* 526 U.S. at 717 ("Although the government acts lawfully when, pursuant to proper authorization, it takes property and provides just compensation, the government's action is lawful solely because it assumes a duty, imposed by the Constitution, to provide just compensation" (citing *First English*, 482 U.S. at 315; *Jacobs*, 290 U.S. at 16)). Paradoxically, the state suit that *Williamson County* requires the owner to file must allege

an uncompensated taking of private property without payment of just compensation--precisely the Fifth Amendment violation that *Williamson County* holds not to have yet occurred.

The paradox deepens with this Court's decision in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), holding that the defendant in the very type of state suit required by *Williamson County* has the right to remove the case to federal court because a federal question is present. *See International College of Surgeons*, 522 U.S. at 164 ("ICS's federal constitutional claims [which included a Just Compensation claim], which turn exclusively on federal law, unquestionably fit within this rule" conferring original jurisdiction on federal courts permitting the removal at issue).

Accordingly, this Court should grant certiorari to review whether *Williamson County* remains viable in the face of the developing law of regulatory takings.

II. *Williamson County*'s Requirement of Two Consecutive Suits for Just Compensation Appears Inconsistent with Doctrines of Claim and Issue Preclusion and the Rooker-Feldman Doctrine

Williamson County establishes a unique procedure, applicable only to Just Compensation claims against state actors, which requires two virtually identical but consecutive lawsuits--the first in state court to seek just compensation, the second (if necessary) in federal court to seek the same relief. Doctrines of issue preclusion, as well as the jurisdictional limitations of the *Rooker-Feldman* doctrine, however, prohibit re-litigation of the state court's decision in federal court. *Williamson County* thus creates a Catch 22: the federal court has no jurisdiction until the state court suit is completed, but completion of the state court suit precludes re-litigation in federal court. In practical effect, then, under *Williamson County* there is no federal court remedy for regulatory takings.

Long-established rules of claim and issue preclusion bar the relitigation of claims or issues in federal court once a

state court decides them. These doctrines are a "fundamental rule of law that serve an important public interest by ensuring a decisive end to litigation." *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 131.12[1] (Matthew Bender 2003) (citing *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1979) ("The doctrine of *res judicata* serves vital public interests . . . This Court has long recognized that '[public] policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties . . . '")).

The application of these principles means that a Just Compensation case, once litigated in state court, cannot be re-litigated in federal court. *See, e.g., Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 1999 U.S. App. LEXIS 6396 (6th Cir. 1999) (affirming district court's dismissal of Just Compensation claim adjudicated in state court based on *res judicata*); *Front Royal and Warren*

County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998); *Dodd v. Hood River County*, 136 F.3d 1219 (9th Cir. 1998) (affirming district court's dismissal of a Just Compensation claim adjudicated in state court based on issue preclusion); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319 (10th Cir. 1998); *Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362 (9th Cir. 1993); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299 (11th Cir. 1992); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3d Cir. 1989). *See also* John J. Delaney and Duane Desiderio, *Who Will Clean Up The "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195, 203 (1999) ("property owners received no resolution of their taking claims in 83 percent of [federal] District Cases [from 1990-1998]").

Moreover the *Rooker-Feldman* doctrine, which holds that a federal court has no jurisdiction to act as an appellate

court over state court Just Compensation judgments,[3] also deprives the *Williamson County* state court litigant of a just compensation remedy. *See, e.g., Wilkinson,* 142 F.3d at 1324-25 (*Williamson County* ripeness requirement in a federal Just Compensation claim is insufficient to preclude application of *res judicata* and collateral estoppel principles, and *Rooker-Feldman* doctrine precludes federal courts from reviewing state court judgments); *Gash Assoc. v. Village of Rosemount*, 995 F.2d 726, 728-29 (7th Cir. 1993) (under *Rooker-Feldman*, federal Just Compensation plaintiffs cannot file collateral attacks on state court's civil judgments in federal district court, but instead must seek review in the Supreme Court); *Adams Outdoor Advertising v. City of East Lansing,* 2001 U.S. Dist. LEXIS 5549, *12-15 (W.D. Mich.

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[3] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 414 (1923) ("This is a bill in equity to have a judgment of a circuit court in Indiana, which was affirmed by the Supreme Court of the state, declared null and void."); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court. Therefore, to the extent that Hickey and Feldman sought review in District Court of the District of

2001) (granting summary judgment to municipal Just Compensation defendant based on *Rooker-Feldman* doctrine); *Community Treatment Centers, Inc. v. City of Westland*, 970 F. Supp. 1197, 1212-1220 (E.D. Mich. 1997).

Some federal courts have come to the opposite conclusion, creating further consternation among property owner litigants. *See, e.g., Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 531 U.S. 815 (2000); *Gulla v North Straba Township,* 146 F.3d 168 (3rd Cir. 1998); *Centres, Inc. v. Town of Brookfield,* 148 F.3d 699, 703 (7th Cir. 1998) (rejecting *Rooker-Feldman* doctrine in a case alleging inverse condemnation); *Gooden v. Faulkner County Sheriff's Dep't*, No. 97-1449, 1997 U.S. App. LEXIS 30497, at *1, 3 (8th Cir. 1997) (Just Compensation claims not barred by *Rooker-Feldman* doctrine).

Columbia Court of Appeals' denial of their petitions for waiver, the District Court lacked subject matter jurisdiction over their complaints.").

Accordingly, this Court should grant review to examine whether the promise of the Fifth Amendment, which *Williamson County* purported to preserve, can in fact survive the salutary requirements of issue preclusion and *Rooker-Feldman* which have, in the vast majority of cases, kept Just Compensation cases out of federal court entirely.

III. The Rule of *Williamson County* Appears to Relegate the Just Compensation Clause to the Status of a "Poor Relation" of Other Constitutional Guarantees

One member of Congress[4] observed that:

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[4] Members of Congress have deemed the burden imposed by *Williamson County* sufficiently unique and significant to warrant proposing legislation on several occasions. *See, e.g.*, Citizens Access to Justice Act of 1999, S. 1028, 106th Cong. (1999); Property Rights Implementation Act of 1998, S. 2271, 105th Cong. (1998); Private Property Rights Implementation Act of 1997, H.R. 1534, 105th Cong. (1997). These bills would all have provided that "a final decision shall not require the party seeking redress to exhaust judicial remedies provided by any State or territory of the United States" in the takings context. *See, e.g.*, S. 1028 § 6(c); S. 2271 § 6(c) H.R. 1534 § 6(c).

Empirical and anecdotal evidence bears out the weight of the procedural burdens that Just Compensation litigants face in gaining access to federal courts. A study of all Just Compensation claims litigated in federal courts between 1983 and 1988 showed that federal judges avoided reaching a decision on the merits on ripeness grounds ninety-four percent of the time. *See* Gregory Overstreet, *The Ripeness Doctrine of The Takings Clause: A Survey Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions*, 10 J. LAND USE &

> Federal environmental laws are readily enforced in federal courts. First Amendment claims against local governments also have no trouble getting heard in federal court. Only private property rights are routinely dismissed or delayed.

143 CONG. REC. S12,482 (daily ed. Nov. 10, 1997) (remarks of Sen. Gorton). Requiring property owners to surmount the obstacle of costly and time-consuming state court litigation presents the risk that the Fifth Amendment, "as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment," will be treated like a "poor relation" among constitutional guarantees in federal courts. *See Dolan v. City of Tigard,* 512 U.S. at 392.

An instructive example (unfortunately all too typical), of the unique procedural obstacles that *Williamson County* erects for Just Compensation claimants is that of Richard and Ann Reahard. *See Reahard v. Lee County,* 30 F.3d 1412

ENVTL. L. 91, 92 n.3 (1994). A later study revealed that more than eighty percent of Just Compensation claims originating in federal district courts between 1990 and 1997 were dismissed on ripeness grounds before the merits were reached. *See* S. REP. NO. 105-242, at 8 (1998) (citing study conducted by the law firm of Lochnes and Blocher LLP). These dismissals functioned as complete termination of many of these cases

(11th Cir. 1994), *cert. denied*, 514 U.S. 1064 (1995). The county declared the Reahards' property a "resource protection area" in 1984, reducing the land's value by 96 percent. The Reahards spent five years thereafter unsuccessfully pursuing administrative remedies under the first prong of *Williamson County*. In 1989, they brought a compensation claim in state court, but county attorneys removed the case to federal district court. The federal court held the case ripe and awarded the Reahards $700,000 in just compensation, and the county appealed. *See Reahard v. Lee County*, No. 89-227-CIV-FTM-10C (M.D. Fla. 1991). The Eleventh Circuit Court of Appeals reversed the award and ordered the district court to review its ripeness holding. *See Reahard v. Lee County*, 978 F.2d 1212 (11th Cir. 1992). The district court again held the case ripe and reinstated the award of $700,000 in just compensation. *See Reahard v. Lee County*, No. 89-227-CIV-FTM-10C (M.D. Fla. 1994). On

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because the property owners could not afford to appeal or continue the litigation. *See id.*

appeal from this second judgment, ten years after the county had taken the Reahards' property, the Eleventh Circuit Court of Appeals, sua sponte, held that the case should, under *Williamson County*, have been tried in state court after all. *See Reahard*, 30 F.3d 1412, 1418 (11th Cir. 1994). Thus, five years after they had first filed in state court, and ten years after their property had been taken without payment of just compensation, the rule of *Williamson County* required the Reahards to begin all over again with a fresh state court suit.

Other constitutional violations are (as they should be) remediable by suit in federal court. Although one could concoct a "*Williamson County*" rule for violations of other provisions of the Bill of Rights, no one has seriously suggested that freedom of speech or assembly have not been denied under the federal Constitution until a litigant has sought and been denied relief in state court. Certainly state courts routinely provide remedies for violations of both state and federal constitutional rights, *see, e.g.*, Michael E. Solimine, *Supreme Court Monitoring of State Courts in the*

Twenty-first Century, 35 IND. L. REV. 335, 337 (2002), and suits under 42 U.S.C. § 1983 are cognizable in both state and federal courts, *see, e.g., Howlett v. Rose*, 496 U.S. 356 (1990) (holding that state courts of general jurisdiction must hear section 1983 claims); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (affirming state court adjudication of section 1983 claim).

This Court should grant certiorari to examine whether the *Williamson County* doctrine conflicts with the principle that the Just Compensation Clause of the Fifth Amendment, "as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation" in terms of federal court access. *See Dolan*, 512 U.S. at 392.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges this Court to grant the Petition for Writ of Certiorari.

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(7)

Case No. 02-1848

In The

Supreme Court of the United States

FRANKLIN P. KOTTSCHADE,

Petitioner,

v.

CITY OF ROCHESTER,

Respondent.

On Petition for Writ Of Certiorari To
The U.S. Court of Appeals for the Eighth Circuit

Motion for Leave to File Amicus Curiae Brief and Brief Amicus Curiae of The Honorable Steve Chabot, Chair Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives

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11 pp

MOTION OF THE HONORABLE STEVE CHABOT, CHAIRMAN OF THE SUBCOMMITTEE ON THE CONSTITUTION OF THE UNITED STATES HOUSE OF REPRESENTATIVES, AS AMICUS CURIAE IN SUPPORT OF APPELLANT FRANK KOTTSCHADE

The Honorable Steve Chabot is Chairman of the House Subcommittee on the Constitution of the House Committee on the Judiciary. The Subcommittee's oversight jurisdiction includes constitutionally protected private property rights. It is with an appreciation of the gravity of this action that Chairman Chabot submits this motion to file an amicus curiae brief to respectfully urge the Court to grant the Petition in this matter.

The Subcommittee has considered proposed legislation in the past to deal precisely with the jurisdictional obstacles that prevent property owners such as Franklin Kottschade from accessing the federal courts. Filing a brief now would be timely, as the Court has ordered the City of Rochester to respond to the Petition by August 25, 2003, and the Petition is presently scheduled for conference on September 29, 2003. Representative Chabot was busy with legislative activity and floor votes prior to the August recess. The parties have filed blanket letters of consent with the Clerk of this Court that would permit the filing of this amicus brief by Representative Chabot.

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Summary of Argument[1]

This Court should review its Takings Clause jurisprudence in this action in order to reconcile its conflicting decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

Reasons for Granting Writ

This Court Should Grant Certiorari to Reconcile its Conflicting Decisions Regarding Whether Takings Claims can be Decided by Federal Courts, and Give Congress Greater Guidance Regarding How to Most Effectively Enforce Constitutional Protections of Private Property Rights.

In *Williamson County*, this Court wrote: "[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." 473 U.S. at 195. That holding has caused a crisis in procedural takings law in which federal judges have avoided addressing the merits of federal takings claims in over 94% of all takings cases litigated between 1983 and 1988,[2] and in which 83%

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[1] Pursuant to Rule 37.6 of the Court, counsel for the amicus discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no person or entities other than the amicus or his counsel made a monetary contribution to the preparation or submission of this brief.

[2] *See* H.R. REP. NO. 106-518, at 10 (citing Gregory Overstreet, The Ripeness Doctrine of the Takings Clause: A Survey of

of the takings claims initially raised in the federal district courts from 1990 to 1998 never reached the merits.[3] Of those property owners who could afford to appeal their cases through the state courts in order to have their case heard in federal court, more than 64% still failed to have their appeals heard on the merits. Moreover, it has been noted that of the small portion of appellate cases where takings claims were found procedurally ripe and the merits reached, "it took property owners, on the average, 9.6 years to have an appellate court reach its determination."[4] Even these shocking statistical profiles of denials of justice cannot reveal the numbers of additional low income or middle class property owners, who – in the face of the extremely expensive and purely procedural challenges that now stand between them and a Federal forum on the merits of their Federal civil rights claims – are too intimidated to even start down the long road to a hearing on the merits of their case in federal court.

During the 106th Congress, Chairman Chabot's predecessor as Chairman of the House Subcommittee on the Constitution, Charles Canady, was the lead sponsor of H.R. 2372,[5] the "Private Property Rights Implementation

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Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Decisions, 10 J. Land Use & Envt'l L. 91, 92 n. 3 (1994)).

[3] *See ibid.* (citing John Delaney and Duane Desiderio, Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse, 31 Urb.Law. at 202-231 (1999), at 196).

[4] *Ibid.*

[5] 106th Cong. (2d. Sess. 2000).

Act of 2000." Among other things, H.R. 2372 was designed to address the systematic suppression of individuals' defenses to property rights violations by clarifying and simplifying the procedures governing federal property rights claims in federal court, and by clarifying when a "final decision" has been made by a local government regarding the permissible use of private property. Moreover, H.R.2372 would have removed the requirement that property owners litigate their federal takings claims in state court first, and provided property owners like Petitioner Franklin Kottschade a meaningful opportunity to have the federal courts decide his case. On March 16, 2000, H.R. 2372 passed the House of Representatives by a vote of 226-182, with Chairman Chabot's support. Clarifying this Court's Takings Clause jurisprudence to determine whether constitutional takings claimants can have their claims decided by federal courts will greatly facilitate Congress's ability to take actions to effectively protect private property rights.

While the burdensome procedural difficulties faced by private property owners seeking to assert their constitutionally protected private property rights are clear, the state of this Court's Takings Clause jurisprudence is not. That is because after this Court decided *Williamson County*, it held in *City of Chicago* that when constitutionally aggrieved landowners properly file their takings actions in state courts, municipal defendants can routinely remove those cases to federal court. That decision relied on 28 U.S.C. § 1441(a), which permits removal of state court actions to federal courts only where the *plaintiff* could have initially filed the action in federal court. Therefore, if this Court was of the view that an exhaustion of state remedies is constitutionally required before a plaintiff can bring a federal takings claim in

federal court, this Court could not have ruled as it did in *City of Chicago*: if a municipality can remove federal (and supplemental state) claims to federal court, then necessarily takings plaintiffs *can* bring their claims in federal court from the start.

One question of great concern to Congress, and to Chairman Chabot by virtue of his oversight responsibilities regarding the protection of private property rights, is, "Does this Court's decision in *City of Chicago* allow plaintiffs to bring their federal takings claims in federal court initially?" If so, Congress may not have to pursue federal legislative solutions, such as H.R. 2372, to the current crisis in which burdensome procedural obstacles prevent private property owners from asserting their federal, constitutionally protected property rights claims in federal court.

The House Judiciary Committee, in its Report on H.R. 2372, contains several statements that support the need for this Court to review its Takings Clause jurisprudence in order to reconcile conflicting reasoning underlying this Court's decision in *Williamson County* and in *City of Chicago*. As stated in the Committee Report on H.R. 2372:

> In *City of Chicago v. International College of Surgeons*, the Supreme Court concluded, "a case containing claims that local administrative action violates Federal law ... is within the jurisdiction of Federal district courts." 522 U.S. 156, at 528-29. Indeed, on remand, the seventh circuit had no difficulty finding that it could appropriately resolve the merits of the takings claim without State court review. The seventh circuit recognized that "the doctrine of abstention is 'an extraordinary remedy

and narrow exception to the duty of a District Court to adjudicate a controversy properly before it' and may be invoked only in those 'exceptional circumstances' in which [a] surrendering jurisdiction 'would clearly serve an important countervailing interest.' *City of Chicago v. International College of Surgeons*, 153 F.3d 356, 360 (7th Cir. 1998). While the ordinance at issue "reflect[ed] important local policy concerns regarding the development and preservation of ... real estate," *id.* at 362, the seventh circuit easily found that the matter before it could be decided on the merits. Thus, the *City of Chicago* decision on remand confirms H.R. 2372's fundamental proposition that Federal courts have an obligation to hear Federal takings cases premised on the conduct of local officials ... Some have argued that because the Supreme Court, in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), discussed takings ripeness requirements in the context of the fifth amendment's reference to "just compensation," takings ripeness requirements are "constitutional" in nature, and beyond the authority of Congress to regulate, rather than purely prudential. However, in *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), the Supreme Court held that when constitutionally aggrieved landowners properly file their takings actions in State courts, the municipal defendants can routinely remove those cases to Federal court. The decision relied on 28 U.S.C. Sec. 1441(a), which permits removal of State court actions to Federal courts only where the plaintiff could have initially filed the action in Federal court. In that case, the

> aggrieved property owner could not have filed its action in the Federal courts under the reasoning of Williamson County, if that reasoning is understood to declare takings ripeness requirements "constitutional" in nature, and also the seventh circuit's opinion in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 463 (7th Cir. 1988) ("[T]he suit for just compensation is not ripe until it is apparent that the State does not intend to pay compensation."). Yet the Supreme Court ruled as it did. Claims that ripeness requirements are somehow "constitutional" in nature, rather than prudential, cannot withstand the holding in *College of Surgeons*.[6]

If this Court agreed to take Petitioner's case, it could do much to alleviate the confusion of many regarding the state of procedural takings law and, consequently, clarify Congress's potential role in protecting private property rights.

Conclusion

This Court should grant Petitioner's requested writ of certiorari and reconcile conflicting legal reasoning underlying its Takings Clause jurisprudence in order to facilitate Congress's ability to effectively enforce constitutionally protected property rights.

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[6] H.R. REP. NO. 106-518, at 19 n.7, 20-21.

DATED: August 22, 2003

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